(1)

Supreme Court, U.S.
FILED
98 1577 JAN 4 1999
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1998

THELMA ROBY
DARLENE SHARPE
JAMES WELCOME,

Petitioners,

vs.

JOHN H. DALTON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit Court

PETITION FOR WRIT OF CERTIORARI

THELMA L. ROBY, *Pro Se*
DARLENE D. SHARPE, *Pro Se*
JAMES R. WELCOME, *Pro Se*
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11988

QUESTION(S) PRESENTED

Are the issues outlined in the appeal before this Supreme Court precedent setting?

Were the Plaintiffs-Appellants' constitutional rights to due process denied when the Appeals Court upheld the lower court decision to dismiss the aforementioned complaints including Johnson et. al., case number 94-30165RV, even after they were made aware that the Attorney of Record for the Plaintiffs-Appellants was incompetent, lacked standing, and was on suspension by the Florida Bar to practice law in the State of Florida?

Would the fact that an attorney who has been sanctioned for disciplinary action by the lower court for similar failures, require a higher level of constitutional scrutiny by the District Court for failure to adequately exercise the duties and responsibilities to properly defend her clients, in order to ensure other clients did not fall prey to the same deficiencies (see LW 96-1072 **Robb vs. Mississippi Bar)**?

Were the Plaintiffs-Appellants denied their constitutional rights to due process of law, as stated in the fourteenth amendment of the Constitution of the United States, when their Counsel of Record, Sadie Moore Stewart, failed to diligently represent her clients, explain matters to them, and inform them that she was under suspension to practice law in the United States District Court for the Northern District of Florida?

Are the Plaintiffs-Appellants entitled to due process of law because of their legal representative's failure to provide adequate defense, failure to timely respond to motions, and failure to correct deficiencies in original filing of claim?

When the Northern District Court severed the case of Abraham Johnson, et. al into 48 separate cases, was the court's failure to grant discovery to each individually named Plaintiff a violation of Plaintiffs-Appellants' Constitutional right of due process?

Did the Appeal Court violate Rule 39 (d) when it allowed the taxable cost out of time?

PARTIES TO THE PROCEEDING BELOW

The parties before this Court are those set forth in the caption, as well as those listed below.

COX, BIRCH AND MARCUS,
Circuit Judges, United States Court of Appeals, Eleventh Circuit

ANTHONY R. CROUSE,
Special Assistant, U.S. Attorney,
Counsel for Defendant-Appellee

ANDREA HEFFERNAN,
Counsel for Defendant-Appellee

PAMELA A. MOINE, Assistant U.S. Attorney,
Counsel for Defendant-Appellee

P. MICHAEL PATTERSON, U. S. Attorney,
Counsel for Defendant-Appellee

MARK EVAN FREDERICK, Esquire,
Prior Counsel for Plaintiff-Appellant

SADIE MOORE STEWART, Esquire,
Prior Counsel for Plaintiff-Appellant

THE HONORABLE ROGER VINSON,
United States District Judge, Northern District of Florida

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PETITION FOR WRIT OF CERTIORARI

Thelma Roby, Darlene Sharpe, and James Welcome respectfully petition for certiorari to review the judgment and opinion of the United States Court of Appeals, Eleventh Circuit in *Thelma L. Roby v. John H. Dalton, Secretary of the Navy, Darlene D. Sharpe v. John H. Dalton, Secretary of the Navy, and James R. Welcome v. John H. Dalton, Secretary of the Navy.*

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. subsection 1254(1).

The date on which the United States Court of Appeals decided my case was October 6, 1998.

A timely petition for rehearing was denied by the United States Court of Appeals on October 6. 1998, and a copy of the order denying rehearing appears at Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution. Amendment XIV, Section 1, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Florida Statutes. The 1998 edition; Title XXXII; Regulation of Professions and Occupations; Chapter 454; Attorney at Law, 454.31, Practice while disbarred or suspended prohibited. "Any person who has been disbarred and who has been lawfully reinstated or is under suspension from the practice of law by any circuit court of the state or by the Supreme Court of the state who shall either directly or indirectly practice law in any manner or hold himself or herself out as an attorney at law or qualify to practice law shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

The Florida Bar Rule 1-3.4 CLER Delinquent Members and CLER Exempt Members. (a) CLER Delinquent Members. Any member who is suspended by reason of failure to complete continuing legal education requirements shall be deemed a delinquent member. A delinquent member shall not engage in the practice of law in this state and shall not be entitled to any privileges and benefits according to members of the Florida Bar in good standing.

Federal Rules of Appellate Procedure. Rule 39(d), Bill of Costs; Objections; Coast to be inserted in Mandate or Added Later. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which the party shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of

costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the Clerk of the Court of Appeals to the Clerk of the District Court.

STATEMENT OF THE CASE

A. ATTORNEY REPRESENTATION

The Plaintiffs-Appellants entered into an Agreement for Representation with Attorney Sadie Moore Stewart, Florida Bar # 970530, in September 1995, regarding case No. 94-30165-RV, Johnson, et. al vs. John H. Dalton, Secretary of the Navy (Appendix D). Attorney Sadie Moore Stewart signed the Agreement For Representation and received compensation in the amount of $15,000.00 for services to provide legal counseling and representation to Plaintiffs. Attorney Sadie Moore Stewart told Plaintiffs that she had extensive experience in Title VII law and she would represent all 46 Plaintiffs in this case. Stewart was given two checks, one for $5,000.00 to be immediately deposited, and one for $10,000 to be held until Cohesion, Inc. was reimbursed funds by it's original attorney, Mark Evan Frederick, who had recently requested to be relieved from the case. Instead of Stewart following the guidelines of the verbal agreement she made with her clients, she immediately and prior to Cohesion, Inc. receiving a written contract presented both checks to Cohesion, Inc.'s bank for payment. Cohesion, Inc. continued to press her for a written contract, however, one never materialized. On November 6, 1995, because of Stewart's negligence in providing a contract, Cohesion, Inc., with limited experience, drafted a contract that was then signed by all parties. In that contract, providing timely responses and

completing all motions thereto, as well as establishing an escrow account, were the main issues of the contract. The Plaintiffs paid an additional $2,500 to Stewart in September 1995 to cover retainer and assistance fees during the deposition of Plaintiffs in the Johnson, et. al.

The Florida Bar filed its complaint in the Supreme Court of Florida against Attorney Sadie Moore Stewart (Appendix E) to conduct disciplinary proceedings according to Rule 3-7.6, Rules of Discipline. Attorney Sadie Moore Stewart continued her practice of law during the period that she was ineligible to practice law in Florida and despite her knowledge that she was ineligible to do so. Rule 1-3.4(a) of the Florida Bar states:

"A delinquent member shall not engage in the practice of law in this state and shall not be entitled to any privileges and benefits afforded to members of the Florida Bar in good standing."

Attorney Sadie Moore Stewart did not provide reasonable diligence and promptness in representing the Plaintiffs-Appellants, nor did she make them aware of her suspension. Attorney Sadie Moore Stewart was suspended from practicing law in Florida for 91 days, effective immediately, following a May 14th court order. In several unrelated cases, Attorney Sadie Moore Stewart violated rules regulating the Florida Bar. She practiced law while suspended and failed to diligently represent her clients, explain matters fully to clients, meet contingency fee guidelines, and comply with many other Florida Bar rules. Attorney Sadie Moore Stewart failed to respond to motions, file claims, and responded out of time to the District Court on behalf of her clients. She violated the attorney/client trust and the Agreement for Representation. knowledge of

negligence. The U. S. Attorney had the responsibility of reporting a pattern of misconduct especially

B. RESPONSIBILITY OF OTHER PARTIES

Even though Stewart is guilty of not properly informing her clients, the defendant's attorneys had an ethnical obligation to inform responsible parties. They also had an obligation, instead of making the Plaintiffs and Stewart the butt of jokes, to inform the court also of this knowledge of negligence. The U.S. Attorney had the responsibility of reporting a pattern of misconduct especially where the victim (who were the Plaintiffs) was unlikely to discover the offenses. Rule 4-8.3 of the Florida Bar requires a lawyer who has knowledge that another lawyer has violated the rules of professional conduct raises a honesty, trustworthiness, or fitness as a lawyer, in other respects, should inform the appropriate professional authority. The Defendant had at his disposal U. S. Attorney, P. Michael Patterson, Assistant U. S. Attorney, Pamela A. Moine, and both their staff, contract support personnel, and 15 other U. S. Attorneys from across the country. These individuals, with such an elaborate amount of proficiency, had to know that the actions or the lack of actions by he attorney of record, Sadie Moore Stewart, would subject Plaintiffs to a status of loss of due process. Self regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the rule of professional conduct, especially when reporting a violation where the victim is unlikely to discover the defense. Since none of the Plaintiffs were bar certified, when the incompetence of our attorney was discovered, the District Court had already rendered a decision in favor of the Defendant on a file that lacked any

assertion of defense on behalf of the Plaintiffs. Lawyers have an obligation, with respect to judicial misconduct, to notify the appropriate authorities. The appropriate person that should have been notified in this case is the United States District Court Judge, Roger Vinson, whom himself should have recognized the deficiencies in the pleadings, the response or lack of motions, and the gross negligence of the attorney of record to provide a proper defense. In his decision to grant summary judgment, he made mention of the lack of defense by Plaintiffs. Knowing all this, the District Court Judge, Roger Vinson, denied every attempt by *Pro Se* Plaintiffs to have the record supplemented so that a fair and impartial decision could be rendered. In order for any element of due process to be maintained, Plaintiffs should have been allowed to present, in full, their case. The United States District Court was aware of the deficiencies of the attorney of record because they themselves reprimanded Sadie Stewart in a similar case by **public reprimand** (1997, **TFB File Number 98-00713-OIB**). The pleadings of the case presented to the court was so deficient that the issues were interchanged from one Plaintiff to another, even after numerous attempts by the Plaintiffs to correct the pleadings on record during video taped deposition and interrogatories. The U. S. District Judge also made rulings on claims for which he lacked jurisdiction and which the appeal's court upheld. Furthermore, the U. S. District Judge made rulings on issues of one Plaintiff which were actually issues of another Plaintiff for which the Plaintiffs specifically and correctly identified on the record during video taped deposition. The U. S. Attorney was fully aware during the long, drawn out, drooling, intimidating, and costly video taped deposition that the pleadings were grossly incorrect, but because the Defendant had no intention of justice being served, issues were defended that

were not properly identified as issues of each individual Plaintiff. The question is how could the U.S. District Court render a decision based on insufficient pleadings, and how could the Appeals Court uphold the lower court's decision on pleadings that were not properly pled?

In as much as *Pro Se* Plaintiffs-appellants' research has not uncovered any existing case law that deals specifically with the denial of due process in a civil action. Plaintiffs-appellants believed that this case is ripe for decision by the Supreme Court.

REASONS FOR GRANTING THE WRIT

Whereas, *Pro Se* Plaintiffs-Appellants retained in good faith Attorney Sadie Moore Stewart, believing her to be of sound, experienced, and competent legal authority, and realized the opposite until such time the District Court rendered a decision unfavorable to the Plaintiffs-Appellants. Plaintiffs-Appellants should not be deprived of their constitutional right to due process due to the negligent misconduct and misrepresentation of Attorney Sadie Moore Stewart, and due to the failure of the U.S. Attorney and the District Judge to protect their constitutional rights. The Petition of Writ of Certiorari should be granted in this case because the decision rendered in this case is precedent in nature. To allow the lower court's decision granting summary judgment to stand would be in direct opposition to decisions rendered in previous cases of similar matters (where the negligence of an attorney to properly defend his/her client and where the client was denied his/her constitutional rights to due process) have been overturned by higher courts **(Pennoyer v. Neiff.** 95 U.S. 733, 24L.Ed.565.). Furthermore, opposition to previous

decisions rendered would be the case if the decision is upheld to grant taxable costs by the Defendant to be incurred by individual Plaintiffs for a claim that was filed out of time in accordance with the Federal Rule of Appellant Procedure Rule 39 (d), and merely to intimidate and deter individuals from pursuing claims of discrimination by billing exorbitant cost to the Plaintiffs.

The Constitution of the United States guarantees that each Plaintiff can expect legal representation and a proper defense. This system has failed in its obligation to the Plaintiffs-Appellees. The docket sheets alone show that the Plaintiffs-Appellants always lacked proper defense, representation, and discovery. The Plaintiffs-Appellants were charged thousands of dollars for the production of documents that were not included in records that have been before this honorable court and that addresses the Plaintiffs-Appellees' rights to due process of law. We believe this case will set a standard of precedence that can be measured for numerous Plaintiffs whose cases have fallen prey to the same type of deficiencies in civil and criminal action. If this was a criminal action, the Supreme Court will overturn the lower court's decisions solely on the reason that the Plaintiff did not have proper defense. Plaintiffs-Appellants have their constitutional rights to counsel. This means adequate legal representation, someone working for the well being of the clients, not just a warm body. If the Justices would pattern their decision in a criminal defense with the situation of an incompetent attorney in this civil case, this case would be remanded back to the District Court for a proper hearing before the District Court Judge, who would make a decision based on a complete and accurate case file.

While lawyers act in part as "self-employed businessmen," they also act "as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes." **(Cohen v. Hurley,366 U. S.** 117, 124 (1961). The conduct of attorneys is governed by rules established by each state and by the American Bar Association's Model Rules of Professional Conduct. All attorneys owe a duty to provide competent and diligent representation to each of it's clients. Attorneys are required to be familiar with well-settled principles of law applicable to a case and to discover law that can be found through a reasonable and discover facts that could materially affect the client's legal rights. This is the Attorney's Duty of Care. The Plaintiffs did not receive due process of law nor did they receive the Attorney's Duty of Care due to Attorney Sadie Moore Stewart's inability to practice law, and her ineligibility to properly represent her clients because she could not practice law before the Florida Bar

Despite the above, and that this honorable court has set standards in historical cases such as Brown v. Board of Education, Roe v. Wade, McDonnell Douglas Corp. v. Green, and Texas Department of Community Affairs v. Burdine, the U. S. District Court along with the U. S. Attorneys, have inexplicably failed to enforce the same course and magnitude used in previous rulings to ensure fairness and justice was upheld.

CONCLUSION

Whereas, *Pro Se* Plaintiffs-Appellants have been denied any form of due process, we prey that this honorable court would restore our constitutional right. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Pro Se
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APPENDIX

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APPENDIX A—DECISIONS OF THE ELEVENTH CIRCUIT COURT OF APPEALS (4) FILED JUNE 30, JULY 1, AND JULY 17, 1998

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-3689
Non-Argument Calendar

District Court Docket No. 96-CV-142

THELMA L. ROBY,

Plaintiff-Appellee,

versus

JOHN H. DALTON,
Secretary of the Navy,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

Before COX, BIRCH and MARCUS, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34 - 3;

Appendix A

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this court that the **judgment** of the said District Court in this cause be and the same is hereby **AFFIRMED**;

It is FURTHER ORDERED THAT Plaintiff-appellant pay to the defendant-Appellee, the costs on appeal to be taxed by the Clerk of Court.

Entered: June 30, 1998
For the Court: Thomas K. Kahn, Clerk

By: "s/_____".
Deputy Clerk

ISSUED AS MANDATE: Oct 30 1998

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-3412
Non-Argument Calendar

District Court Docket No. 3:96-CV-151

DARLENE D. SHARPE,

Plaintiff-Appellee,

versus

JOHN H. DALTON,
Secretary of the Navy,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

Before COX, BIRCH and MARCUS, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34 - 3;

Appendix A

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby **AFFIRMED**;

It is FURTHER ORDERED THAT Plaintiff-appellant pay to the defendant-Appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 1, 1998
For the Court: Thomas K. Kahn, Clerk

By: "s/_____".
Deputy Clerk

ISSUED AS MANDATE: Sep 25 1998

Appendix A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-3412-1
Non-Argument Calendar

D.C. Docket No. 3:96-CV-151-RV

DARLENE D. SHARPE,

Plaintiff-Appellant,

versus

JOHN H. DALTON,
Secretary of the Navy,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(July 1, 1998)

Before COX, BIRCH and MARCUS, Circuit Judges.

PER CURIAM:

Appendix A

Darlene Sharpe appeals summary judgment against her on her claims against the Secretary of the Navy for discrimination on the basis of race and in retaliation for EEO activity. We affirm.

One of Sharpe's claims is that in 1989 she was discriminatorily placed in a nonprofessional job series. She filed a timely complaint with the Navy's Equal Employment Office concerning this claim, but she later abandoned it. (R.1-315, McCann Decl. Tab 2 at 17.) In 1993, she filed another EEO complaint raising the same claim. (R. 1-315, Haworth Decl. Tab 1.) The EEO dismissed this complaint as untimely, and she appealed this dismissal to the Equal Opportunity Employment Commission. *(Id.;* R.1-315, Haworth Decl. Tab 3.) While the EEOC appeal was pending, but before 180 days had elapsed from the filing of the appeal, Cohesion, Inc., a corporation, sued the Secretary of the Navy claiming employment discrimination on behalf of 33 people, including Sharpe. *(See* R.2-464, at 1, 5.) The district court dismissed this complaint for want of standing. *(See id.)* The current amended complaint including Sharpe as a named Plaintiff was filed after Sharpe had received a ruling from the EEOC affirming the dismissal of her complaint as untimely. *(See* R. 1-17; R. 1-315, Haworth Decl. Tab 4.)

The district court concluded on this procedural history that it lacked jurisdiction over this claim because less that 180 days had elapsed from the filing of the EEOC appeal when Cohesion, Inc. filed suit. *(See* R.2-464, at 5 (citing 29 C.F.R.§ 1614.408(d); *Tolbert v. United States,* 916 F.2d 245, 248 (5th Cir. 1990)).) But Sharpe was not a party to

the Cohesion, Inc. suit; she first asserted a claim in district court when the amended complaint was filed. At that time, she had received an EEOC ruling. The district court thus had jurisdiction. And it properly granted summary judgment because the EEO correctly determined that Sharpe's complaint to the EEO was untimely, having been filed four years after the alleged discriminatory actions[1] *See Pacheco v. Rice*, 966 F.2d 904, 905 (5th Cir. 1992) (claims untimely presented to the EEO barred from federal court consideration absent grounds for excuse).

The district court found that it lacked jurisdiction for similar reasons on Sharpe's retaliation claims, but went on to hold on the merits that Sharpe had not shown a prima facie case of retaliation. We agree with the district court's analysis of the merits of the retaliation claims.

For the foregoing reasons, the grant of summary judgment is affirmed.

AFFIRMED.

[1] It appears that Sharpe's filing suit was untimely because it followed the EEOC ruling by more than 90 days, *see* 42 U.S.C. § 2000e-16(c), but the Secretary does not malice such an argument, and we do not address it.

Appendix A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-3210
Non-Argument Calendar

D.C. Docket No. 3:96-CV-174-RV

JAMES R. WELCOME,

Plaintiff-Appellant,

versus

JOHN H. DALTON,
Secretary of the Navy,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(July 17, 1998)

Before COX, BIRCH and MARCUS, Circuit Judges.

PER CURIAM:

Appendix A

The district court properly granted summary judgment for the reasons stated in the district court's summary judgment order. (R.2-457.) The other issues raised by Welcome on this appeal are meritless and do not warrant discussion. See 11th Cir, R. 36-1.[1]

AFFIRMED.

"Costs taxed against the Plaintiff-appellant."

Entered: July 17, 1998
For the Court: Thomas K. Kahn, Clerk

By: "s/ _____".

[1] 11th Cir.R.36-1 provides:
When the court determines that any of the following exist:
(a) judgment of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(e) judgment has been entered without a reversible error of law;
and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B—DECISIONS OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA (3) FILED SEPTEMBER 23, SEPTEMBER 16, AND AUGUST 8, 1996

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

THELMA ROBY,

Plaintiff,

Case No. 96cv142-RV

v.

JOHN H. DALTON,
Secretary of the Navy,
Defendant. /

ORDER

Pending is the defendant's motion for summary judgment of the claims of Plaintiff Thelma Roby. (doc.232) Also pending is the defendant's motion for partial summary judgment for the disparate treatment and retaliation claims of the Plaintiff. (doc. 367)

I. BACKGROUND

This is an employment discrimination action, brought pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. ss 2000e, et. seq.). Originally, former Plaintiff Cohesion, Inc. attempted to sue on behalf of thirty-three individuals; however, the defendant's motion to dismiss

for lack of standing was granted on January 27, 1995. The complaint was amended to substitute forty-six individual Plaintiffs, including Thelma Roby. The claims of the individual Plaintiffs were later severed into individual actions.

The Plaintiff, Thelma Roby, is a black female. Roby alleges that the defendant subjected her to numerous discriminatory practices during the course of her employment, and that she was discriminated against on the basis of her race. Roby also alleges retaliation. Except as noted, the following facts are not in dispute.

Roby began working at Naval Aviation Depot Pensacola ("NADEP") in March 1988 as a Man-hour Cost Accounting Clerk (GS-0503-02) in the Management Controls Department. She was promoted to GS-04 in October 1988. She was promoted to Shot Peening Machine Operator (WG-3769-01) in March 1989, and to Welder Helper (WG-3703-05) in October 1989. In April 1990 she was promoted to Shot Peening Machine Operator (WG-3769-08) in the Metals Division of the Production Department. Her position was moved to the Manufacturing & Components Department at NADEP in October 1991. She transferred to the North Island (California) Detachment in February 1995, where she works today.

In 1991, Roby applied for EEO Specialist GS-7 and GS-9 positions for which she was rated highly qualified and qualified, respectively. She was not selected for the positions. Eva Leatherwood and Greg Stallworth, both black employees, were selected for the positions. According to Roby, her non-selection was in retaliation for her union activities and for past EEO complaints. Roby filed a formal

complaint on June 24, 1993, and signed a settlement agreement on June 30, 1994. (Haworth decl., ex. 3-4) Roby filed an appeal to the EEOC on October 21, 1994, alleging that the defendant failed to comply with the settlement agreement. (Haworth decl., ex. 4-5).

In March 1993, Roby's first line supervisor, Philemon Evans, asked Roby to stand in for him since it was Roby's turn on the roster. Roby attended a meeting as acting supervisor regarding allowing employees to take smoke breaks only at designated break times. When Roby asked the employees to sign a roster, Evelyn Mercon wrote "under protest" on the roster next to her name. When Roby asked Mercon if she had a problem, Mercon told Roby that she had a problem with Roby being acting supervisor. Roby attempted to leave the room, and Mercon blocked her exit and pushed her back into the room. According to Roby, the defendant did not punish Mercon for her behavior, and failed to protect Roby from further possible incidents involving Mercon.

According to Roby, she was orally admonished by Leroy Boyd, a supervisor, regarding the incident with Mercon. Boyd told Roby that she did not have the authority to counsel Mercon. Roby alleges that Boyd's comments were made in retaliation for his being named in her previous EEO complaints.

Roby alleges that she was denied training and experience in the hazardous materials area starting in 1991. Roby was not able to apply for temporary promotions to several hazardous waste positions because she did not have

the necessary training. Although Roby asked for training in November 1992, she was told that such training would never lead to permanent positions. She requested training from Albert Baxter in 1992 and wrote a memorandum requesting that she be allowed to work with the HAZMAT team. Roby filed a formal complaint of discrimination on September 8, 1994.

Roby filed a union grievance on October 30, 1992, concerning a performance appraisal rating given to her by Leo Stanford. Roby alleges that Stanford lied on an official document when he discriminated against her by giving her a poor performance rating. Roby filed an EEO complaint on March 29, 1993. The agency dismissed her complaint, and Roby appealed to the EEOC on May 29,1993 (Haworth decl., ex.12). On September 3, 1993, the EEOC affirmed the agency decision, on the ground that Roby had previously elected to pursue the union grievance procedure.

According to Roby, she was denied the chance to compete for eighteen positions filled in the Human Resources Office during September and October 1993. Roby filed a formal complaint on January 12, 1994 (Haworth deal., ex. 13), which was settled by a mediated agreement on June 30, 1994. Roby filed an appeal to the EEOC to enforce the terms of the agreement on October 21, 1994. (Haworth decl., ex. 4-5)

Roby alleges in the amended complaint that: (1) she was not selected for GS-7 and GS-9 EEO Specialist positions; (2) the defendant failed to protect her from a white employee, Evelyn Mercon; (3) she was orally

admonished by Leroy Boyd; (4) she was denied training and experience in the hazardous materials area; (5) a supervisor lied on an official document when he gave Roby a poor performance rating; and (6) she was denied the opportunity to compete for eighteen positions in the HRO office during September and October 1992. Roby also alleges disparate impact.[1]

II. ANALYSIS

A. Summary Judgment Standard

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R.Civ. P. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 273 (1986). See Everett v. Napoer, 833 F.2d 1507, 1510 (11th Cir. 1987).

However, summary judgment is improper "[i]f a reasonable fact finder could draw more than one inference

[1] The defendant's motion for partial summary judgment on all plaintiffs' disparate impact claims was granted on February 28, 1996. (doc. 439)

from the facts, and that inference creates a genuine issue of material fact." Cornelius v. Highland Lake, 880 F.2d 348, 351 (11th Cir 1989), cert. denied, 494 U.S. 1066, 110 S. Ct. 1784, 108 L. Ed. 2d 785 (1990). An issue of fact is "material" if it might affect the outcome of the case under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S.242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. Id See also Matsushita Electric Indus. Co. v. Zenith Radio Corp, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986).

Conclusory allegations based on speculation, subjective beliefs, or bald assertions based upon unsubstantiated hearsay are insufficient to create a "genuine issue of material fact." Carter v. Miami, 870 F.2d 578, 585 (11th Cir.1989); Ramsev Heath, 706 F.2d 1166, 1170 (11th Cir. 1983). On the other hand, if the record taken as a whole could lead a rational trier of fact to find for the nonmovin party, then the issue of fact is genuine, Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574. 58648, 1356, 89 L.Ed.2d 538 552 (1986).

The court may not weigh evidence to resolve a factual dispute; if a genuine issue of material fact is present, the court must deny summary judgment. Hutcherson v. Progressive Corp., 984 F.2d 1152, *1155* (11th Cir. 1993). On a summary judgment motion, the record and all reasonable inferences that can be drawn from it must be viewed in the light most favorable to the non-moving party. McCabe Sharett, 12 F.3d 1558, 1560 (11th Cir. 1994).

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B. **Discussion**

The defendant contends that several of Robins claims are barred for failure to exhaust administrative remedies The defendant also contends that Roby has failed to establish a prima facie case of discrimination or retaliation.

(1) **Failure to Exhaust Administrative Remedies**

Roby alleges that she was denied training in the hazardous materials area, and that as a result, she was not eligible for temporary promotions to hazardous waste positions. The defendant contends that Roby's claim is barred, since she failed to Contact an EEO Counselor within the required 45 day period.

A federal employee must seek administrative review of his grievance before filing a suit for unlawful discrimination in employment under Title V11. Young v. National Center for Health Serv. Research, 828 F.2d 235, 237 (4th Cir. 1987). As a first step, the employee must speak to an EEO counselor about an alleged act of discrimination within 45 days of the alleged act. 29 C.F.R. § 1614.10s(a)(1). The time period begins to run when 'the facts that would support a charge of discrimination would have been apparent to a similarly situated person with a reasonably prudent regard for his rights." Bovd v. United States Postal Serv., 752d 410, 414 (9th Cir, 1985); Bickham v. Miller, 584 F.2d 736 738 (5th Cir. 1978). Failure to notify the EEO counselor in timely fashion may bar a claim, absent a defense of waiver, estoppel, or equitable tolling. Pacheco v. Rice, 966 F.2d 904,906 (5th Cir. 1992);

Nealon v. Stone, 958 F.2d 584, 589 (4th Cir. 1992); Benign. Frank, 943 F.2d 609, 612 (6th Cir. 1991); Bovd v. United States *Postal* Serv., 752 F.2d 410, 414 (9th Cir. 1985).

Roby's claims arise from conduct occurring in 1992 and 1993, when hazardous material positions were first developed in Roby's workplace. (Haworth deal., ex. 8) Roby filed a formal complaint in September 1994, alleging that the agency prevented black employees from receiving hazardous material training in order to prevent them from gaining permanent positions. (Haworth decl., ex. 8) Roby testified at her deposition that she suspected in 1992 and 1993 that blacks were being discriminated against by not being allowed to receive hazardous material training. (Roby dep., at 103-05) Even where a Plaintiff docs not know all the facts regarding the mechanisms of the discrimination, equitable tolling is inappropriate where the Plaintiff was aware that the defendant was violating her right to be free of racial discrimination in his employment. See McClinton v. Alabama By-Products Corp, 743 F.2d 1483, 1487 (11th Cir. 1984). Since Roby failed to notify the EEO counselor in timely fashion of her claim, and has made no showing of waiver, estoppel. or equitable tolling, the claim is barred for failure to exhaust administrative remedies. Roby alleges that her foreman, Leo Stanford, discriminated against her by giving her a poor performance rating. The defendant contends that Roby failed to timely file her civil action as to this claim.

A federal employee must seek administrative review of his grievance before filing a suit for unlawful discrimination in employment under Title V11. Brown v.

General Services Administration, 425 U.S. 820, 832-33, 96 S.Ct. 1961,1967-68, 48 L.Ed.2d 402 (1976). A federal employee who has filed a Title V11 complaint may file a civil action within 90 days of receiving the Commission's final decision on an appeal. 29 C.F.R. § 1614.408(c). A claim may be time barred if filed too late. See Jones v.Runvon, 32 F.3d 1454, 1457 (Roth Cir. 1994); Long v. Frank, 22 F.3d 54, 57 (2nd Cir. 1994).

Roby filed an EEO complaint raising this claim on March 29, 1993. (Haworth decl., ex. 11) The agency dismissed her complaint, and Roby appealed to the EEOC on May 29, 1993. (Haworth decl., ex. 12) On September 3, 1993, the EEOC affirmed the agency decision, on the ground that Roby had previously elected to pursue the union grievance procedure. Roby filed the present action on May 17, 1994, more than 90 days after she received the EEOC decision. Accordingly, her claim is barred for failure to exhaust administrative remedies.

(2} **Disparate Treatment**

Roby alleges that she was discriminated against when:

(1) she was not selected for GS-7 and GS-9 EEO Specialist positions for which she was rated highly qualified; (2) her commander did not take disciplinary action against a white female employee who assaulted her; and (3) she received an oral admonishment from a supervisor who was not in her chain of command. The defendant contends that Roby has failed to establish a prima facie case of discrimination as to her claims.

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Title V11 of the Civil Rights Act of 1964 provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1988). The Plaintiff may establish a prima facie case of discrimination under Title V11 on the basis of statistical proof of a pattern of discrimination, or on the basis of direct evidence of discrimination, which consists of "evidence which, if believed, would prove the existence of discrimination without inference or presumption." Carter v. City of Miami, 870 F.2d 578, 581-82 (11th Cir. 1989). In the usual case, however, direct evidence is not present, and the Plaintiff must rely on circumstantial evidence to prove discriminatory intent, using the framework established in McDonnell Doualas Coro. v. Green, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973). Under McDonnell Douglas, a Plaintiff establishes a prima facie case of race discrimination under Title V11 by showing: (1) she belongs to a racial minority; (2) she was subjected to adverse job action; (3) her employer treated similarly situated employees outside his classification more favorably and (4) she was qualified to do the job. McDonnell Douglas Corp., 411 U.S. at 802, 93 S.Ct. at 1824, 36 L.Ed.2d 677 See St. Mary's Honor Ctr v Hicks, _ U.S. _, 113 S.Ct. 2742, 2747, 125L.Ed.2d 407 (1993). Demonstrating a prima facie case is not onerous; it requires only that the Plaintiff establish facts adequate to permit an inference of discrimination. Williams v. Ford Motor Co., 14 F.3d 1305, 1308 (8th Cir. 1994). See Texas Dep"t of Community Affairs v. Burdine, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1093-4, 67 L.Ed.2d 207 (1981).

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a. Promotions To GS-7 and GS-9

Roby contends that she was denied promotions to GS-7 and GS-9 EEO Specialist positions. The defendant contends that the Plaintiff has not shown that an equally or less qualified individual outside of the Plaintiff's class received the promotion.

Roby applied for GS-7 and GS-9 EEO Specialist positions in 1992. Eva Leatherwood, Greg Stallworth, Leona Bjorklund, Patricia Stewart and Frances Pinson were chosen for the positions. Leatherwood, Stallworth, and Pinson are black employees, while Bjorklund and Stewart are white.

Roby was rated "highly qualified" for the GS-7 position, as was the selectee, Leona Bjorklund. (Sass deal., ex. 5) Roby had no college credit hours, and no prior EEO experience. In contrast, Bjorklund had an Associate's Degree and eight years experience as an EEO Assistant.

Roby was given a rating of "qualified" for the GS-9 position. Stewart had two years of experience as an EEO Counselor. Stallworth had a Master's Degree in Public Administration, and experience on the CNET Staff Human Relations Council. Pinson had three and a half years experience as an Equal Opportunity Assistant. Leatherwood had five years experience as an EEO counselor. (Sass deal., ex. 7) Of the selectees for the GS-9 position, only Stewart was not of Roby's protected class.

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While Roby docs not dispute that she did not have as much EEO-related experience as the selectees, she argues that her experience as a union representative is sufficient to qualify her for the positions. However, the agency was specifically seeking someone experienced in EEO procedures. (Washington decl.) All the selectees had such experience, while Roby did not. "[T]he employer has the discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria "Texas Dept of Communitv Affairs v. Burdine, 450 U.S. 248,259, 101 S.Ct. 1989, 1096,67L.Ed.2d207(1981). Here, the selectees were selected because they had more experience and education. Roby has presented no evidence of discrimination on the part of the defendant in making selections for the positions. Roby's conclusory allegations of discrimination are insufficient to create an issue of fact. Carter v. Miami, 870 F.2d 578, 585 (11th Cir. 1989); Forsbero v. Pacific Northwest Bell Tel. Co., 840 F.2d 1409, 1419 (9th Cir.1988); Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir.), cert. denied, 474 U.S. 829, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985). In addition, the defendant has proffered evidence supporting a legitimate nondiscriminatory reason for its non-selection of Roby for the positions, and Roby has not come forward with any evidence to show that this reason is pretextual. The defendant is entitled to summary judgment on Roby's non-selection claim.

b. Assault By White Emplovee

Roby alleges that she was assaulted by Evelyn Mercon, a white employee, and that the defendant failed to protect Roby from Mercon and forced Roby to work with Mercon after the assault.

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When Roby was allegedly assaulted, she was the stand-in supervisor for Philemon Evans, Roby's first line supervisor. (Evans decl.) Roby submitted a request after the incident that Mercon be moved out of the building. Mercon submitted a request through her attorney that Roby be moved out of the building. (Evans decl.) While an investigation of the incident was pending, Leroy Boyd, the shop supervisor, decided to move both Roby and Mercon out of the shop area. Neither Roby nor Mercon lost any benefits from being moved out of the shop (Evans deal.).

The defendant contends that Roby has failed to show that she suffered an adverse job action. I agree. Section 2000e-2(a)(1) of Title V11 makes it an unlawful employment practice to discriminate against an individual with respect to "compensation, terms, conditions, or privileges of employment ...." See, e.g., Jordan v. Clark, 847 F.2d 1368, 1373 n.3 (9th Cir. 1988), cert. denied, 488 U.S. 1006, 109 S.Ct. 786, 102 L.Ed.2d 778 (1989); Bundy v. Jackson, 641 F.2d 934, 942 (D.C.Cir. 1981). See also Chandler v. Roudebush, 425 U.S. 840, 841, 96 S.Ct.1949, 1950, 48 L.Ed:2d-4~6 (1976). "[U]ltimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating" are the types of personnel actions subject to Title V11 relief. Page v. Boluer, 645 F.2d 227, 233 (4th Cir.) (en bane), cert. denied, 454 U.S. 892, 102 S.Ct. 388, 70 L.Ed.2d 206 (1981). See Dollis v. Rubin, 77 F.3d 777, 781 (5th Cir. 1995). There is no Title V11 violation absent a materially adverse change in terms and conditions of employment. Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994); Cradv v. Liberty

National Bank & Trust Co. of Indiana, 993 F.2d 132, 136 (7th Cir. 1993); Plaisance v. Travelers Ins. Co., 880 F.Supp. 798, 810 (N.D.Ga. 1994), aff'd, 56 F.3d 1391 (11 th Cir. 1995). Here, while Roby was moved out of the shop, she did not lose any benefits or suffer any loss in grade or salary. She was not disciplined for the incident involving Mercon. Mercon was treated the same way. Since the Plaintiff has not shown that she suffered an adverse job action, she has failed to establish a prima facie case of discrimination.

c. Oral Admonishment

Roby alleges that she was orally admonished by a supervisor not in her chain of command. The defendant contends that Roby has failed to show that she suffered an adverse employment action.

After the incident between Roby and Mercon, Roby's Division Director, Harris Hill, asked Roby's supervisor, Leroy Boyd, to take action on the investigative report concerning the incident. The report could not conclude who was telling the truth. Hill decl.; 2 Roby dep., p. 110) Boyd counseled both employees and advised them that if such an incident occurred again, they would be disciplined (Roby dep., p. 9596).

There is no Title V11 violation absent a materially adverse change in terms and conditions of employment. Harlston v. McDonnell Douglas Corral., 37 F.3d 379, 382 (8th Cir. 1994). Roby has not shown that she suffered an

adverse change in her employ7ment through receiving the oral admonishment from Boyd, her supervisor. The admonishment did not constitute an official disciplinary action, and was not placed on her personnel record. (Sass decl., ex. 12) In addition, while Roby alleges racial bias in the application of- the discipline against her, she has failed to show that the disciplinary measures enforced against her were more severe than those enforced against Mercon, a white female. See Jones v. Gerwens, 874 F.2d 1534, 1540 (11th Cir. 1989). The defendant could not determine which of the two employees caused the incident, and both received an oral admonishment. Since Roby has presented no evidence of discrimination in the decision to orally admonish her, and the defendant has established legitimate, non-discriminatory reasons for its action, the defendant is entitled to summary judgment on Roby's claim.

(3) Retaliation

Roby alleges that she was retaliated against when she was denied the chance to compete for positions filled in the Human Resources Office during September and October 1993. According to Roby, eighteen positions were filled without competition and without regard for the Merit Promotion process. To establish a prima facie case of retaliation, the Plaintiff must show: (1) that she engaged in statutorily protected expression; (2) that she suffered an adverse employment action; and (3) that there is some causal relationship between the two events. Meeks v. Computer Associates Int'l, 15 F.3d 1013, 1021 (11th Cir. 1994); E.E.O.C. v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993); Archuleta v. Colorado Dept. of Institutions, 936 F.2d

483 (10th Cir.1991). To recover for retaliation, the Plaintiff "need not prove the underlying claim of discrimination which led to [his] protest;" however, the Plaintiff must have had a reasonable good faith belief that the discrimination existed. Tipton v. Canadian Imperial Bank of Commerce, 872 F.2d 1491, 1494 (11th Cir. 1989). To meet the causal link requirement, the Plaintiff "merely has to prove that the protected activity and the negative employment action are not completely unrelated." E.E.O.C. v. Reichhold Chemical. Inc., 988 F.2d 1564, 1571 -72 (11th Cir. 1993). The Plaintiff must at least establish that the employer was actually aware of the protected expression at the time the employer took adverse employment action against the Plaintiff. Goldsmith v. Citv of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993); Weaver v. Casa Gallardo. Inc., 922 F.2d 1515, 1524 (11th Cir. 1991). The employer's awareness of the statement may be established by circumstantial evidence. -id.

During September and October 1993, twelve vacancies existed for GS positions at NAS Pensacola dealing with personnel functions at elementary and secondary schools on military installations in the United States. (Gonzalez decl.) Ten of the positions were filled competitively through merit staffing, while two were filled through noncompetitive actions outside the merit staffing process. (Gonzalez decl.) Seven other vacancies existed at the Human Resources Office. (Gonzalez deal.) At a meeting of HRO managers on September 28, 1993, Barry Foster, the head of HRO, stated that HRO might lose positions not filled by September 30, 1993, the end of the fiscal year.

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Because there was not enough time to conduct merit staffing competitions, the managers decided to fill the positions noncompetitively. Foster instructed the managers to select only employees from activities scheduled for closure or realignment. Roby did not meet the requirements for the noncompetitive selection, which depended upon grade level, and was not eligible for any of the positions. (Gonzalez deal.) William Gonzalez was the selecting official for the positions in question. (2 Gonzalez deal.)

Roby docs not dispute that Gonzalez was unaware of her prior EEO activity at the time he made the selections for the positions in question. She has presented no evidence that the other management officials involved in allowing certain positions to be filled noncompetitively were aware of her prior EEO activity. To establish a prima facie case of retaliation, the Plaintiff must at least show the employer was actually aware of the protected expression at the time the employer took adverse employment action against the Plaintiff. Goldsmith v. City of Atmore, 996 F.2d 1 155, 1 163 (11th Cir. 1993). Roby has failed to establish the employer's awareness of her protected activities.

In addition, the defendant has presented legitimate, non-discriminatory reasons for its actions. Roby docs not dispute that because of the nature of the vacancies, the defendant did not have time to use a competitive merit staffing process to fill the vacancies. Since Roby has failed to demonstrate that the employer's explanation is a pretext for retaliation, and has presented no other evidence of retaliation, the defendant is entitled to summary judgment on Roby's retaliation claim. See Goldsmith v. Citv of Atmore, 996 F.2d 1 155, 1 163 (11th Cir. 1993).

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III. CONCLUSION

For the reasons discussed above, the defendant's motions for summary judgment (doc. 232) and for partial summary judgment (doc. 367) are GRANTED as to the claims of Plaintiff Thelma Roby. Since all claims of Plaintiff Thelma Roby have been resolved, the Clerk is directed to enter judgment for the defendant and against Plaintiff Thelma Roby, together with taxable costs.

DONE AND ORDERED this 23rd day of September, 1996.

By: "s /_____".
ROGER VINSON
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DARLENE SHARPE,

Plaintiff,

Case No. 95cv151-RV

v.

JOHN H. DALTON,
Secretary of the Navy,

Defendant.
_____/

ORDER

Pending is the defendant's motion for summary judgment of the claims of Plaintiff Darlene Sharpe. (doc.314) Also pending is the defendant's motion for partial summary judgment for the retaliation claims of the Plaintiff (doc. 403).

I. BACKGROUND

This is an employment discrimination action, brought pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. ss 2000e, et. seq.). Originally, former Plaintiff Cohesion, Inc. attempted to sue on behalf of thirty-three individuals; however, the defendant's motion to dismiss for lack of standing was granted on January 27, 1995. The

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The Plaintiff, Darlene Sharpe, is a black female. Sharpe alleges that the defendant subjected her to numerous discriminatory practices during the course of her employment, and that she was discriminated against on the basis of his race. Sharpe also alleges retaliation. Except as noted, the following facts are not in dispute.

Sharpe began working at Naval Air Station Pensacola ("NAS") as a Student Aid in the office of the Director of Air Training for the Chief of Naval Education and Training. Her position changed to Student Trainee (Management & Financial Analysis) (GS-0099-04) in the Mgmt Support Activity Department of NETPMSA. Her position was changed to Budget Analyst (GS-0:44-05) in the Financial Information Processing Center Department in May 1989. She was promoted to Financial Specialist (GS-0501-07) in November 1991, and was promoted to the next grade (GS-09) in November 1992. In September 1994, Sharpe successfully competed for a reassignment to Management Analyst (GS-0343-09) in the Manpower and Personnel Department in CNET, where she remains today.

Sharpe completed her requirements for a Bachelor's Degree in Business Administration in March 1989. Prior to her graduation, Sharpe had been employed under the NETPMSA College Cooperative Program. According to Sharpe, she had been told by her supervisor, Dick Crenshaw, that she would be converted into a professional series position. However, only a limited number of positions were available, and Sharpe was asked in May 1989 if she would accept a Payroll Clerk position at the GS-05 rate with promotion potential to GS-09. Sharpe accepted the position. She was asked to sign a letter stating that she had had a Budget Analyst job for the first two weeks, and that she had

requested to be changed to a Payroll Clerk position. Sharpe signed the letter although she knew it was untrue, because she was told by Melba Antoine that Sharpe would not have a job if she did not sign the letter.

Sharpe alleges that placing her in a nonprofessional series violated Office of Personnel Management regulations. She filed an informal EEO complaint in June 1989, but withdraw the complaint on August 11, 1989. She filed a formal complaint on November 12, 1993, which was dismissed as untimely on March 10, 1994. According to Sharpe, the dismissal of her November 12,1993, complaint by the agency was in retaliation for her filing of the complaint. She filed a formal complaint on April 25,1994, concerning the dismissal of the prior complaint, and that complaint was itself dismissed on May 11,1994. Sharpe appealed to the EEOC, which affirmed the dismissal of the April 25, 1994, complaint on September 14, 1994.

Sharpe alleges that she was retaliated against for prior EEO activity when she was removed from the CPATS/LCM project by her supervisor, Jacklyn Crumpler, and replaced by a two-higher-grade white female. A white co-worker, Mike Keeth, was removed and replaced at the same time. Sharpe filed a formal EEO complaint on October 17, 1994. The complaint was dismissed by the agency on May 19, 1995, due to the filing of the present action.

Sharpe alleges in the amended complaint that: (1) she was placed in a nonprofessional series position; (2) her EEO complaint concerning her placement was dismissed in retaliation for EEO activity; and (3) she was removed from the CPATS project. Sharpe also alleges disparate impact.[1]

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II. ANALYSIS

A. Summary Judgment Standard

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a maker of law.! Rule 56(c), Fed. R. Civ. P. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 273 (1986). See Everett v. Napoer, 833 F.2d 1507,-1510 (11th Cir. 1987).

However, summary judgment is improper "if a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact." Cornelius v. Highland Lake, 880 F.2d 348, 351 (11th Cir. 1989), cert. denied, 494 U.S. 1066, 110 S. Ct.1784, 108 L. Ed. 2d 785 (1990). An issue of fact is "material" if it might affect the outcome of the case under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S.242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party.

Id. See also Matsushita Electric Indus. Co. v. Zenith Radio Coro., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986).

Conclusory allegations based on speculation, subjective beliefs, or bald assertions based upon unsubstantiated hearsay are insufficient to create a "genuine issue of material fact." Carter v. Miami, 870 F.2d 578, 585 (11th Cir.1989); Ramsey v. Leath, 706 F.2d 1166, 1170 (11th Cir. 1983). On the other hand, if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party, then the issue of fact is genuine. Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986).

The court may not weigh evidence to resolve a factual dispute; if a genuine issue of material fact is present, the court must deny summary judgment. Hutcherson v. Progressive Corp., 984 F.2d 1152, 1155 (11th Cir. 1993). On a summary judgment motion, the record and all reasonable inferences that can 'be drawn from it must be viewed in the light most favorable to the non-moving party. McCabe v. Sharett, 12 F.3d 1558, 1560 (11th Cir. 1994).

B. Discussion

The defendant contends that several of Sharpe's claims are barred for failure to exhaust administrative remedies. The defendant also contends that Sharpe has failed to establish a prima facie case of retaliation.

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(1) Failure to Exhaust Administrative Remedies

Sharpe alleges that she was placed as a cooperative program graduate in a non-professional series position. The defendant contends that Sharpe's claim is barred, since she withdrew her claim from the administrative process, and attempted to resurrect her claim in an untimely manner

Sharpe filed an EEO complaint in July 1989, and voluntarily withdrew her complaint on August 11, 1989. A federal employee must seek administrative review of her grievance before filing a suit for unlawful discrimination in employment under Title V11. Brown v. General Services Administration, 425 U.S. 820, 8.32-33, 96 S.Ct. 1961, 1967-68, 48 L.Ed.2d 402 (1976). The purpose of requiring Plaintiffs to exhaust administrative remedies is to avoid burdening courts with cases that otherwise might be terminated successfully by mediation and conciliation. Ingels v. Thiokol Corp., 42 F.3d 616, 625 (10th Cir. 1994); McGintv v. United States Dep't of the Armv, 900 F.2d 1114, 1117 (7th Cir. 1990). A claimant who abandons or withdraws her claim before the agency has reached a determination "cannot be deemed to have exhausted administrative remedies." Khader v. Aspin, 1 F.8d 968, 970 (10th Cir. 1993). See Rivera v. United States Postal Service, 830 F.2d 1037, 1039 (9th Cir. 1987); Sharon v. Yellow Freight Svstem, Inc., 872 F.Supp. 839, 844 (D.Kan. 1994); Brown v.Citvof New York, 869 F.Supp. 158, 170 (S.D.N.Y. 1994).

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Sharpe filed a formal complaint of discrimination concerning her claim on November 12, 1993, in an attempt to resurrect her claim. The agency dismissed her complaint, and she appealed to the EEOC on September 24,1995. Sharpe then filed the present action on May 17, 1994, while her EEOC appeal was still pending.

A complainant who files an appeal with the EEO(: may file a civil action in federal court after 180 days from the date of filing an appeal if no final decision has been issued. 29 C.F.R. § 1614.408(d). A Plaintiff who files before the expiration of the 180 days has failed to exhaust her administrative remedies, and is barred from bringing his claim in federal court. Tolbert v. United States, 916 F.2d 245, 248 (5th Cir. 1990); Thomoson v. West, 883 F.Supp. 1502, 1508 (S.D.Ala. 1995). Here, Sharpe's claim was filed before withdrawal from the administrative process in order to file suit constitutes a failure to exhaust administrative remedies. Tolbert v. United States, 916 F.2d 245, 249 (5th Cir. 1990); Rivera v. United States Postal Service, 830 F.2d 1037, 1039 (9th Cir. 1987).

Allowing a claimant to file too early "would tend to frustrate the ability of the agency to deal with complaints. All participants would know that at any moment an impatient claimant could take his claim to i court and abort the administrative proceedings." McGinty v. United States Dep't of Armv, 900 F.2d 1114, 1117 (7th Cir. 1990) (quoting Purtill v. Harris, 658 F.2d 134, 138 (3rd Cir. 1981). To withdraw constitutes abandoning one's claim. Ri'vera v. United States Postal Service, supra, 830 F.2d at 1039. See Vinieratos v. United States Dept of Air Force,

939 F.2d 762, 768-69 (9th Cir. 1991). Dismissal with prejudice on the basis of lack of subject matter jurisdiction is appropriate. See Askew v. Stone, 1996 WL 135042 (6th Cir. 1996); Tolbert v. United States, supra, 916 F.2d at 249; Thompson v. West, 883 F.Supp. 1502, 1509 (M.D.Ala. 1996); Patel v. Derwinski, 778 F.Supp. 1450, 1457 (N.D.III. 1991). Abandoning the administrative process prior to the expiration of the 1 80-day time period deprives the court of subject matter jurisdiction, and the filing requirement is not subject to equitable tolling. Askew v. Stone, 1996 WL 135042 (6th Cir. 1996). The fact that 180 days has now passed while this case has been pending docs not cure the Plaintiff's error, since "such a rule would permit Plaintiff to file prematurely and then to wait out the 180-day period in this Court." Patel v. Derwnski, supra, 778 F.Supp. at 1457. Accordingly, the defendant is entitled to summary judgment on Sharpe's claim that she was placed in a nonprofessional position.[2]'

(2) **Retaliation**

Sharpe also alleges that her complaint of November 12, 1993, was dismissed in retaliation for prior EEO activity. The defendant contends that this claim is untimely. Sharpe filed a formal EEO complaint on April 25, 1994, alleging that her complaint of November 12, 1993, had been dismissed by the agency in retaliation for prior EEO

[2] Sharpe argues that her administrative complaint of November 12, 1993, was timely filed. According to Sharpe, the discriminatory events concerning her placement were continuing in nature, and continued until the filing of the complaint in 1993. However, the timeliness of Sharpe's administrative complaint is irrelevant, since, as explained above, she filed her civil action too early.

activity. Sharpe filed her claim in the present action on May 17, 1994, twenty-two days after Sharpe filed a formal EEO complaint on April 25, 1994, alleging that her complaint of November 12, 1993, had been dismissed by the agency in retaliation for prior EEO activity. Sharpe filed her claim in the present action on May 17, 1994, twenty-two days after filing her EEO' complaint. Under the applicable EEOC regulations, a complaint who has filed an individual complaint is authorized to file an action under Title V11 "after 180 days from the date of filing an individual or class complaint if an appeal has not been filed Andrea final decision has not been issued." 29 C. F. R. § 1614.408 (1995). Since Sharpe files' before the expiration of the 180 day period, she is barred from barred from bringing her retaliation claim in federal court. Tolbert v. United States, 916 F.2d 245, 248 (5th Cir.1990); Thompson v. West, 883 F.Supp. 1502, 1508 (S.D.Ala. 1995).

Nevertheless, I will consider the merits of Plaintiff's retaliation claim to insure completeness. Sharpe alleges that in retaliation for prior EEO activity: (1) her complaint of November 12, 1993 was dismissed; and (2) she was removed from the CPAT project.

To establish a prima facie case of retaliation, the Plaintiff must show: (1) that she engaged in statutorily protected expression; (2) that she suffered an adverse employment action; and (3) that there is some causal relationship between the two events. Meeks v. Computer Associates Int'l, 15 F.3d 1013, 1021 (11th Cir. 1994); E.E.O.C. v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993);

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Archuleta v. Colorado Dept. of Institutions, 936 F.2d 483 (10th Cir. 1991). The term "employment action" may be construed in light of Section 2000e-2(a)(1), which makes it an unlawful employment practice to discriminate against an individual with respect to "compensation, terms, conditions, or privileges of employment ...." See, e.q., Jordan v. Clark, 847 F.2d 1368, 1373 n.3 (9th Cir. 1988), cert. denied, 488 U.S. 1006, 109 S.Ct. 786, 102 L.Ed.2d 778 (1989); Bundy v. Jackson, 641 F.2d 934, 942 (D.C.Cir. 1981). See also Chandle_ v. Roudebush, 425 U.S. 840, 841, 96 S.Ct. 1949, 1950, 48 L.Ed.2d 416 (1976).

(a) Dismissal of Complaint

Sharpe alleges that her complaint of November 12, 1993, was dismissed in retaliation for the filing of that complaint. The defendant contends that, even assuming Sharpe has established a prima facie case of retaliation, it has shown legitimate, nondiscriminatory reasons for the dismissal of the complaint.

Sharpe's complaint of November 12, 1993, alleged that in 1989, she had been placed as a cooperative program graduate in a nonprofessional series position. The complaint was dismissed by the agency on March 10, 1994. The notice of dismissal stated that since Sharpe did not contact an EEO counselor until September 3, 1993, while the alleged discriminatory events occurred in March 1989. Sharpe failed to initiate contact with the EEO counselor within the required 45-day time limit. (2 Sass decl., ex. 2) The notice of dismissal also stated that the complaint stated the same claim as the complaint of July 1989, which Sharpe had withdrawn on August 11, 1989.

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Even assuming that Sharpe has established a prima facie case of retaliation, the defendant is still entitled to summary judgment on Sharpe's claim. Once the Plaintiff establishes his prima facie case, the employer must proffer a legitimate, nondiscriminatory reason for the adverse employment action. E.E.O.C. v. Reichhold Chemical, Inc., 988 F.2d 1564, 1571-72 (11th Cir. 1993). If the employer offers legitimate reasons for the employment action, the Plaintiff must then demonstrate that the employer's proffered explanation is a pretext for retaliation. Meeks, 15 F.3d at 1021; Goldsmith v. City of Atmore, 996 F.2d 1155,1163 (11th Cir.1993). Here, the defendant relied upon applicable regulations in dismissing Sharpe's claim. Clapsadl decl. See 29 C.F.R. § 1614.105(1) (1995). Sharpe has not refuted the evidence offered by the defendant, and has failed to demonstrate that the defendant's proffered explanation is a pretext for retaliation. Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993). The defendant is entitled to summary judgment on Sharpe's claim. See Grigsby v. Reynolds Metals Co., 821 F.2d 590, 596 (11th Cir. 1987).

(b) Removal from CPAT/LCM Project.

Sharpe also alleges that she was removed from the CPATS/LCM project and replaced by a higher grade co-worker in retaliation for filing an EEO Complaint on June 21, 1994. The defendant contends that Sharpe has failed to establish an adverse personnel action, and that the defendant has shown legitimate, nondiscriminatory reasons for its action.

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Sharpe was removed from the project on August 25,1994. A white male, Mike Keeth, was also taken off the project. (2 Sharpe dep., at p. 74) Sharpe's supervisor, Jacklyn Crumpler, was Division Head of Resource Information Systems at NETPMSA. Crumpler assigned Keeth and Sharpe to collect part of the data for a segment of the project. After they completed their portion, higher ranking analysts were assigned to complete the technical review and findings and recommendation phases. (Crumpler deal.)

"[U]ltimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating" are the types of personnel actions subject to Title Vll relief. Pane v. Bolger, 645 F.2d 227, 233 (4th Cir.) (en bane), cert. denied, 454 U.S. 892, 102 S.Ct. 388, 70 L.Ed.2d 206 (1981). See Dollis v. Rubin, 77 F.3d 777, 781 (5th Cir. 1995). There is no Title V11 violation absent a materially adverse change in terms and conditions of employment. Harlston v. McDonnell Douglas Corp, 37 F.3d 379, 382 (8th Cir.1994); Crady v. Libertv National Bank & Trust Co. of Indiana, 993 F.2d 132,136 (7th Cir.1993); Plaisance v. Travelers Ins. Co., 880 F. Supp. 798, 810 (N.D.Ga. 1994), aff'd, 56 F.3d 1391 (11th Cir. 1995). Sharpe docs not dispute the evidence presented by the defendant that she was taken off the project because she had completed her assignment. Since Sharpe has not shown that she was subjected to an adverse job action, she has failed to establish a prima facie case of retaliation. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1824, 36 L.Ed.2d 668, 677 (1973); Coutu v. Martin Cty. Bd. of Cty. Commissioners, 47 F.3d 1068, 1073 (11th Cir. 1995).

In addition, the defendant has shown legitimate, nondiscriminatory reasons for removing Sharpe from the project. The defendant is entitled to summary judgment on Sharpe's claim.

III. CONCLUSION

For all the reasons discussed above, the defendants' motions for summary judgment (doc. 314) and for partial summary judgment (doc. 403) are GRANTED as to the claims of Plaintiff Darlene Sharpe). Since all claims of the Plaintiff have been resolved, the Clerk is directed to enter judgment for the defendant and against Plaintiff Darlene Sharpe, together with taxable costs.

DONE AND ORDERED

this 13th day of September, 1996.

"s/ ".

ROGER VINSON
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JAMES R. WELCOME,

Plaintiff,

Case No. 96cv174/RV

v.

JOHN H. DALTON,
Secretary of the Navy,

Defendant.
_____/

ORDER

Pending is the defendant's motion to dismiss or, in the alternative, for summary judgment of the claims of Plaintiff James R. Welcome. (doc.325) Also pending is the defendant's motion for partial summary judgment on the disparate treatment and reprisal claims of the Plaintiff. (doc. 387)

I. BACKGROUND

This is an employment discrimination action, brought pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. ss 2000e, et. seq.). Originally, former Plaintiff Cohesion, Inc. attempted to sue on behalf of thirty-three individuals; however, the defendant's motion to dismiss for lack of standing was granted on January 27, 1995. The

complaint was amended to substitute forty-six individual Plaintiffs, including James R. Welcome.

The Plaintiff, James R. Welcome, is a black male. Welcome alleges that the defendant subjected him to numerous discriminatory practices during the course of his employment, and that he was discriminated against on the basis of his race. Welcome also alleges that the defendant retaliated against him. Except as noted, the following facts are not in dispute.

Welcome began working at the Pensacola Naval Air Station ("NAS") in 1980 in the position of Warehouse Worker (WG-6907-05) in the Service Department of the Public Works Center. In September 1984, he was promoted to Supply Technician (GS-2005-06), and moved to the Chief of Naval Education and Training ("CNET") Supply Department.

In October 1984, Welcome entered the Electroplater Apprentice program, and moved to the Naval Aviation Depot Production Department, Metals Division. He was promoted to the position of journeyman Electroplater (WG-3711-09) in 1988. In 1990, he was promoted to Electroplater Foreman (WS-3711-09). As a result of the 1991 Reduction-In-Force (RIF) at NADEP, he was changed to Industrial Specialist (Aircraft) (GS-1150-11). He currently works in that position.

In December 1993, Welcome applied for the position of Equal Employment Specialist (GS-260-11) on Merit Promotion Vacancy Announcement CPE-0296(93). The

announcement was for a vacancy at Naval Air Station Meridian, Mississippi. The Merit Promotion was suspended before issuance of the Certificate of Eligibles.[1] HRO management chose to post the vacancy through the Office of Personnel Management in order to gain access to a wider pool of qualified applicants. Welcome did not apply through the OPM for the position. (Gonzalez decl.)

During 1994 and 1995, Welcome requested that his Priority Placement Program ("PPP") registration be revised to include the registered skill of Equal Employment Specialist (GS-0260-11). Based on the written information submitted by Welcome as to his qualifications for the position, HRO staffing specialists found Welcome to be less than "fully qualified" for the position, and did not register him on the PPP.

Upon denial of Welcome's request for registration, Welcome filed an EEO complaint against Lee Weiland, Supervisory Personnel Staffing Specialist at HRO. On May 23, 1994, while Welcome was reviewing his PPP folder, he asked Weiland several questions about his PPP status. Weiland informed Welcome that he could not answer specific questions about the PPP folder because the

[1] The Certificate of Eligibles is the listing of eligible applicants ranked according to their rating, which is given by evaluators designated by management. (Reboulet decl.)

questions were the subject of the pending EEO complaint. At the request of Welcome, Weiland had no further involvement with Welcome's PPP folder after May 31, 1994.

In 1994, Welcome was given approval to attend Track III of the CNET Equal Employment Opportunity Practitioners' Workshop. Track I concerned the process of informal EEO complaint processing, Track II concerned formal complaint processing, and Track III focused on EEO efforts to prevent potentially discriminatory situations through proactive initiatives. Because actual EEO complaints were used during the lectures in Track I and Track II lectures, attendance was limited to employees whose positions directly involved the processing of such complaints. Welcome was registered only for Track III classes. On March 16, 1994, Welcome entered Janice Swann's Track II workshop. Swann informed Welcome that he would have to leave the classroom, since he was not registered for Track II classes.

Welcome filed a formal complaint of discrimination on May 27, 1994, alleging that he was discriminated against on the basis of race when: (1) he was denied the opportunity to gain employment as an Equal Employment Specialist; (2) he was denied the opportunity to change his PPP status; and (3) he was ejected by Janice Swann from an EEO class. The agency dismissed the complaint on May 11, 1995. Welcome appealed to the EEOC, which affirmed the agency's decision on June 8, 1995.

Welcome alleges in the amended complaint that: (1) he was denied promotion to Equal Employment Specialist;

(2) he was denied the opportunity to change his Priority Placement Program status to an Equal Employment Specialist; (3) he was denied the opportunity to attend an EEO Formal Complaint Process training session; and (4) he was retaliated against when Lee Weiland refused to speak to Welcome regarding his PPP registration and job placement. Welcome also alleges disparate impact.[2]

II. ANALYSIS

A. Summary Judgment Standard

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. "(T)he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing

[2] The defendant's motion for partial summary judgment on all Plaintiffs' disparate impact claims was granted on February 28, 1996. (doc. 439)

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 273 (1986). See Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987). However, summary judgment is improper "if a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact." Cornelius v. Highland Lake, 880 F.2d 348, 351 (11th Cir. 1989), cert. denied, 494 U. S.1066,110 S. Ct.1784,108 L. Ed. 2d 785 (1990). An issue of fact is "material" if it might affect the outcome of the case under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,248,106 S.Ct.2505, 2510, 91 L.Ed.2d 202, 211 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. Id. See also Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986).

Conclusory allegations based on speculation, subjective beliefs, or bald assertions based upon unsubstantiated hearsay are insufficient to create a "genuine issue of material fact." Carter v. Miami, 870 F.2d 578,585 (11th Cir.1989); Ramsev v. Leath, 706 F.2d 1166, 1170 (11th Cir. 1983). On the other hand, if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party, then the issue of fact is genuine. Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corn, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986).

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The court may not weigh evidence to resolve a factual dispute; if a genuine issue of material fact is present, the court must deny summary judgment. Hutcherson v. Progressive Corp., 984 F.2d 1152, 1155 (11th Cir. 1993). On a summary judgment motion, the record and all reasonable inferences that can be drawn from it must be viewed in the light most favorable to the non-moving party. McCabe v. Sharett, 12 F.3d 1558, 1560 (11 th Cir. 1994).

Discussion

(1) Disparate Treatment

The defendant contends that the Plaintiff has failed to establish a prima facie case of disparate treatment on the basis of race as to any of his claims.

Title V11 of the Civil Rights Act of 1964 provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. ss 2000e-2(a)(1) (1988). The Plaintiff may establish prima facie case of discrimination under Title V11 on the basis of statistical proof of a pattern of discrimination, or on the basis of direct evidence of discrimination, which consists of "evidence which, if believed, would prove the existence of discrimination without inference or presumption." Carter v. City of Miami, 870 F.2d 578, 581-82 (11th Cir. 1989). In the usual case, however, direct evidence is not present, and the Plaintiff must rely on circumstantial evidence to prove discriminatory intent, using the framework established in McDonnell Douglas Corp. v.

Green, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973). Under McDonnell Douglas, a Plaintiff establishes a prima facie case of race discrimination under Title V11 by showing: (1) he belongs to a racial minority; (2) he was subjected to adverse job action; (3) his employer treated similarly situated employees outside his classification more favorably; and (4) he was qualified to do the job. McDonnell Douglas Corn., 411 U.S. at 802, 93 S.Ct. at 1824, 36 L.Ed.2d 677. See St. Mary's Honor Ctr. v. Hicks, _ U.S. _, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993). Demonstrating a prima facie case is not onerous; it requires only that the Plaintiff establish facts adequate to permit an inference of discrimination. Williams Ford Motor Co., 14 F.3d 1305,1308 (8th Cir.1994). See Texas Dep't of Communitv Affairs v. Burdine, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1093-4, 67 L.Ed.2d 207 (1981).

(a) Non-Selection for Equal Employment Specialist

The Plaintiff alleges that the defendant discriminated against him when it denied him a promotion to an Equal Employment Specialist on Merit Promotion Announcement CP-0296(93) by removing the position from the competitive process. The defendant argues that the Plaintiff has failed to demonstrate that the decision to remove the job from the competitive application process and use approved procedures to fill the vacancy was pretext to disguise discriminatory motivation.

In December 1993, Welcome applied for the position of Equal Employment Specialist under a Merit Promotion Announcement. Before any of the candidates were rated and the Certificate of Eligibles issued, the Announcement was

suspended, and HRO management posted the vacancy through the Office of Personnel Management in an attempt to gain access to a wider pool of qualified applicants. (Welcome dep., at 69) At any time prior to the issuance of the Certificate of Eligibles, a Merit Promotion vacancy may be canceled in favor of an alternative procedure for filling the vacancy. (Gonzalez decl.) Welcome did not apply through OPM for the position.

The defendant contends that Welcome has not demonstrated that similarly situated persons outside his classification were treated more favorably as to the Merit Promotion vacancy, and that Welcome has failed to present any evidence supporting an inference of discrimination. I have to agree. Here, Welcome was not denied promotion to Equal Employment Specialist on the Merit Promotion Vacancy announcement. Instead, the announcement was canceled before Welcome was rated, and Welcome did not re-apply under the OPM open competitive announcement. The sole support for Welcome's allegations in the complaint are his conclusory statements that the cancellation of the announcement was racially motivated. Such conclusory allegations of discrimination are insufficient to create an issue of fact. Carter v. Miami, 870 F.2d 578, 585 (11th Cir. 1989); Forsberg v. Pacific Northwest Bell Tel. Co., 840 F.2d 1409, 1419 (9th Cir. 1988); Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir.), cert. denied, 474 U.S. 829, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985). In addition, the defendant has proffered evidence supporting a legitimate nondiscriminatory reason for canceling the announcement, and Welcome has not come forward with any evidence to show that this reason is pretextual. The defendant is entitled

to summary judgment on Welcome's claim of non-selection for Equal Employment Specialist.

(b) Priority Placement Program

Welcome alleges that he was denied the opportunity to change his Priority Placement Program ("PPP") status from an Electroplater Supervisor to an Equal Employment Specialist, and that as a result he was denied a promotion to Equal Employment Specialist on a Merit Promotion Vacancy Announcement. The defendant maintains that the Plaintiff has failed to demonstrate a prima facie case of discrimination, since Welcome was not qualified to change his PPP status.

Under the Priority Placement Program, an employee may register for up to five occupational series for which the employee has been rated "fully qualified" by HRO, one of which must be the employee's present series.[3] . To be considered fully qualified, the employee must be able to enter the position and fully perform the duties of the position without training. (Gonzalez decl.) During 1994 and 1995, Welcome requested on several occasions that his PPP registration be revised to include the registered skill of Equal Employment Specialist. Welcome's experience for the position consisted of his membership on a voluntary EEO committee and of his activities as a complainant. (Gonzalez decl.) Staffing specialists at HRO found that Welcome was not fully qualified for the position.

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[3] The purpose of the PPP is to provide at least one valid job offer to each PPP registrant who either has been or is scheduled to be adversely affected by a reduction in force or workload transfer. (Gonzalez decl.)

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As part of the Title V11 Plaintiff's prima facie case, the Plaintiff must show that his employer treated similarly situated employees outside his classification more favorably than himself. Coutu v. Martin Cty. Bd. of Cty. Commissioners, 47 F.3d 1068, 1073 (11th Cir. 1995). If a Plaintiff fails to show the existence of a similarly situated employee, summary judgment is appropriate where no other evidence of discrimination is present. See, e.g., Mack v. Great Atlantic and Pacific Tea Co., 871 F.2d 179, 182 (1st Cir. 1989). Here, Welcome has failed to show that similarly situated employees outside his classification were allowed to register on the PPP without being "fully qualified" for the position. Welcome has offered no evidence supporting an inference of discrimination. But even assuming that Welcome has established a prima facie case, the defendant is still entitled to summary judgment on Welcome's PPP claim. Once the Plaintiff has established a prima facie case, thereby raising an inference that she was the subject of intentional race discrimination, the burden shifts to the defendant to rebut this inference by presenting legitimate, non-discriminatory reasons for its employment action. Texas Dep't of Community Affairs v. Burdine, 450 U.S.248, 101 S.Ct.1089, 67 L.Ed.2d 207 (1981). This intermediate burden is "exceedingly light." Turnes v. AmSouth Bank, N.A.,36 F.3d 1057,1061 (11th Cir.1994). The defendant has fully met its burden in this case.

The evidence in the record shows that Welcome was not registered as an Equal Employment Specialist on the PPP because he was not "fully qualified" for the position, as is required. On the basis of Welcome's SF 171, HRO specialists found that Welcome did not have sufficient EEO experience to step into the position of Equal Employment

Specialist without training. Welcome has produced no evidence that the defendant did not properly follow its procedures, or that he had the requisite experience to qualify under the criteria. Nor has Welcome shown that the use of the criteria constituted a pretext for discrimination. Welcome has failed to establish that the defendant's proffered reason is unworthy of credence, or that the defendant was more likely motivated by a discriminatory reason in taking its actions. See Karazanos v. Navistar Int'l Transu. Corp., 948 F.2d 332, 336 (7th Cir.1991). Since the defendant has proffered evidence supporting a legitimate, nondiscriminatory reason for not enrolling Welcome on the PPP, and Welcome has not come forward with any evidence to show that this reason is pretextual, summary judgment is warranted. See Richmond v. Board of Resents of Universitv of Minnesota, 957 F.2d 595, 598 (8th Cir. 1992); Karazanos, 948 F.2d at 336; Mason v. Pierce, 774 F.2d 825, 829 (7th Cir. 1985).

(c) Equal Emplovment Opportunitv Traininq

Welcome alleges that he was denied the opportunity to attend an EEO Formal Complaint Process training process by Janice Swann, a white female.

In March 1994, Welcome requested permission to attend the CNET Equal Employment Opportunity Practitioners' Workshop. The purpose of the workshop was to provide training for EEO practitioners whose official duties concerned EEO matters. Attendance to Tracks I and II of the workshop were limited to such practitioners, and involved the examination of actual EEO complaints. (Swann

decl.) However, Track III was open to non-specialists. Since Welcome was a member of NADEP's Commanding Officer Action Committee on EEO, a voluntary advisory group, he was allowed to enter Track III, even though he was not eligible for Tracks I and 11. (Welcome dep., at 79)

On March 16, 1994, Welcome entered Janice Swann's Track II classroom. Swann informed Welcome that he was in the wrong classroom, since he could not attend Track II classes, and Welcome left. (Welcome dep., at 77) Welcome testified in his deposition that he believed discrimination was the basis for Swann's action. However, Welcome's conclusory allegations of discrimination are insufficient to create an issue of fact. Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir.), cert. denied, 474 U.S. 829, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985). Welcome docs not dispute that he was not registered for Track II classes, and was not eligible to register for such classes. He has presented no evidence, circumstantial or otherwise, to support his allegation that Swann asked Welcome to leave her class on the basis of Welcome's race. The central inquiry in evaluating whether the Plaintiff has met his initial burden in a Title V11 case is whether the circumstantial evidence presented is sufficient to create an inference of discrimination. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1123 (11th Cir. 1993); Shah v. General Electric Co., 816 F.2d 264, 268 (6th Cir. 1987). Sufficient evidence is simply not present in this case as to Welcome's claim concerning the Track III workshop.

(b) Retaliation

Welcome alleges that the defendant retaliated against him when Lee Weiland, an HRO employee, refused to

speak with Welcome about Welcome's PPP registration because of Welcome's pending EEO complaint against Weiland. Welcome contends that Weiland's actions interfered with Welcome's job placement and PPP registration. The defendant argues that Weiland's action did not constitute a adverse employment action under Title V11, and that Welcome has not established a prima facie case of retaliation.

To establish a prima facie case of retaliation, the Plaintiff must show: (1) that he engaged in statutorily protected expression; (2) that he suffered an adverse employment action; and (3) that there is some causal relationship between the two events. Meeksv. Computer Associates Int'l, 15 F.3d 1013, 1021 (11th Cir. 1994); E.E.O.C. v. Ohio Edison Co., 7 F.3d 541 (6th Cir.1993);Archuleta v. Colorado Dept. of Institutions, 936 F.2d 483 (10th Cir. 1991). The term "employment action" may be construed in light of Section 2000e-2(a) (1), which makes it an unlawful employment practice to discriminate against an individual with respect to "compensation, terms, conditions, or privileges of employment ...." See, e.g., Jordan v. Clark, 847 F.2d 1368, 1373 n.3 (9th Cir. 1988), cert. denied, 488 U.S. 1006, 109 S.Ct. 786, 102 L.Ed.2d 778 (1989); Bundv v. Jackson, 641 F.2d 934, 942 (D.C.Cir. 1981). See also Chandler v. Roudebush, 425 U.S. 840, 841, 96 S.Ct. 1949, 1950, 48 L.Ed.2d 416 (1976).

The Plaintiff alleges that Weiland's retaliatory actions interfered with his job placements in PPP registration. "He being supervisor staffing specialist of HRO, I feel that he displayed his true racist attitudes toward me in his comments." (Welcome dep., at 102) According to Weiland,

he could not answer Welcome's questions about the specifics of his PPP registration because Welcome's questions were the subject of Welcome's EEO complaint against him. (Wetland decl.) Welcome has produced no evidence that Weiland's action harmed him, or affected his PPP registration. Shortly after the incident, Weiland was removed from handling the Plaintiff's PPP file at Welcome's request. (Welcome dep., at 104)

Welcome has failed to show how Weiland's action affected his terms or conditions of employment. Since the Plaintiff has not shown that he was subjected to an adverse job action, he has failed to establish a prima facie case of retaliation. McDonnell Douglas Corn. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1824, 36 L.Ed.2d 668, 677 (1973); Coutu v. Martin Ctv. Bd. of Ctv. Commissioners, 47 F.3d 1068, 1073 (11th Cir. 1995).

Even assuming that Welcome has established a prima facie case of retaliation, the defendant is still entitled to summary judgment on Welcome's retaliation claim. Once the Plaintiff establishes his prima facie case, the employer must proffer a legitimate, non-discriminatory reason for the adverse employment action. E.E.O.C. v. Reichhold Chemical, Inc., 988 F.2d 1564,1571-72 (11th Cir.1993). If the employer offers legitimate reasons for the employment action, the Plaintiff must then demonstrate that the employer's proffered explanation is a pretext for retaliation. Meeks, 15 F.3d at 1021; Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993).

Here, Welcome alleges that Weiland refused to answer his questions about PPP registration. Weiland states

in his affidavit that when Welcome's request to add Equal Employment Specialist to his PPP registration was denied, Welcome filed an EEO complaint naming Weiland as a respondent on March 3, 1994. (aft. to doc. 388, Weiland decl.) On May 23, 1994, when Welcome was reviewing his PPP folder, he asked Weiland to answer some questions. Weiland told Welcome that he could not answer certain questions about the PPP folder, since the questions were the subject of the EEO complaint Welcome had filed against him in March 1994, and were part of an ongoing investigation. (aft. to doc.388, Weiland decl.) Weiland requested that Tom Easley and Berniece Reboulet answer the questions. The defendant has definitely met its burden of presenting legitimate, non-discriminatory reasons for Weiland's action.

Pursuant to departmental policy, Weiland could not answer Welcome's questions because of the pending EEO complaint. Welcome has not refuted the evidence offered by the defendant, and has failed to demonstrate that the defendant's proffered explanation is a pretext for retaliation. Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993). In this case, the defendant's evidence of a legitimate, non-discriminatory reason for its action is so strong as to rebut completely the inference raised by the Plaintiff's prima facie case of retaliation. See Grigsby v. Reynolds Metals Co., 821 F.2d 590, 596 (11th Cir.1987). The evidence supporting Welcome's prima facie case is simply not sufficient to create an issue of fact in light of the substantial evidence of lawful motive presented by the defendant. As a result, the defendant is entitled to summary judgment on the Plaintiff's retaliation claim.

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III. CONCLUSION

For the reasons discussed above, the defendant's motion for summary judgment is GRANTED as to the claims of James R. Welcome. (doc. 325) The defendant's motion for partial summary judgment on the disparate treatment and retaliation claims of Plaintiff James R. Welcome is GRANTED. (doc. 387) The Clerk shall enter judgment for the defendant and against plaintiff Welcome, together with taxable costs.

DONE AND ORDERED this 8th day of August, 1996.

"s/_____".
ROGER VINSON
United States District Judge

APPENDIX C—ORDERS (3) DENYING REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED OCTOBER 6, 1998, SEPTEMBER 16, 1998 AND OCTOBER 20, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-3689

THELMA ROBY,

Plaintiff-Appellant,

versus

JOHN H. DALTON,
Secretary of the Navy,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Florida

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BEFORE: COX, BIRCH AND MARCUS, Circuit Judges.
PER CURIAM:

The petition for rehearing filed by the appellant is DENIED.
ENTERED FOR THE COURT:

"s/EMMETT R. COX"
UNITED STATES CIRCUIT JUDGE

ORD-41

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-3412

DARLENE D. SHARP,

Plaintiff-Appellant,

versus

JOHN H. DALTON,
Secretary of the Navy,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Florida

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BEFORE: COX, BIRCH AND MARCUS, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by the appellant is DENIED.

ENTERED FOR THE COURT:

"s/EMMETT R. COX"
UNITED STATES CIRCUIT JUDGE

ORD-41

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-3689

JAMES R. WELCOME,

Plaintiff-Appellant,

versus

JOHN H. DALTON,
Secretary of the Navy,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Florida

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___F.2d___).

Before: COX, BIRCH AND MARCUS, Circuit Judges.
PER CURIAM:
The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing En Banc are DENIED.
ENTERED FOR THE COURT:

"s/EMMETT R. COX"
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

APPENDIX D——AGREEMENT FOR REPRESENTATION BETWEEN ATTORNEY SADIE MOORE STEWART AND PLAINTIFFS SIGNED NOVEMBER 6, 1995

AGREEMENT FOR REPRESENTATION

FEE:

As compensation for services, Cohesion, Inc., agrees to pay Attorney Sadie Moore Stewart a fee of $15,000. This agreement is entered into by and among all named Plaintiffs regarding case No. 94-30165-RV, Johnson, et.al. V. John H. Dalton, Secretary of the Navy and Attorney Sadie Moore Stewart, Fla. Bar # 970530.

ATTORNEYS' RESPONSIBILITIES:

Attorney Stewart is responsible for the timely answering of any and all outstanding motions, ensuring that all interrogatories and production of documents are properly addressed, scheduled interviews with all Plaintiff's to ensure that all interrogatories are properly addressed and answered, ensure adequate time is allowed for PLAINTIFFS, individually or the Board of Directors of Cohesion, Inc., where issues affect all PLAINTIFFS or multiple PLAINTIFFS, to review legal actions prior to timely filing.

Conduct any all Depositions and requests for production of documents.

Render timely responses and complete all motions thereto.

Provide legal counseling and representation to PLAINTIFFS when necessary to ensure compliance with this agreement.

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Submit written reports of all actions taken on behalf of PLAINTIFFS on a monthly basis. Said reports will be mailed to COHESION, INC.,at P.O. Box 16189, Warrington, Fla. 32507 within five days of the end of each month until full settlement of aforementioned case or superseding of this agreement by mutual consent of the parties hereto whichever occurs first.

We understand and agree that our attorney will render periodic statements to us indicating the current status of our account and complaint.

ATTORNEY'S ALLOWED TO EXERCISE LIMITED DISCRETION:

I understand or have had explained to me, the fact that it frequently becomes necessary for an attorney to make choices of alternatives that may be presented in the courses of his/her representation of us.

We further understand that full discussion of such alternatives may not be practical or even possible in a given situation. Therefore, we authorize our attorney to exercise discretion after discussion with any one of the designated executive board members.

Subsequent to any negotiations or settlement talks, we agree that our attorney will meet, discuss and obtain approval of the full body unless time restricts and time constraints are required approval from the board with a two third vote.

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CONSTRUCTION OF AGREEMENT:

This agreement will be construed and interpreted according to the Laws of the State of Florida and the Code of Professional Responsibility. No paragraph heading will be relied upon or utilized in the interpretation of any of this agreement such readings being for convenience only, and in all references herein to persons, whether attorney, client or others, the use of any particular gender or the plural or singular number is intended to include the appropriate gender of numbers as the written instrument may require.

RIGHTS OF CLIENT TO CANCEL:

This contract may be canceled by written notification to the attorney at any time it is deemed the attorney is flagrantly missing deadlines, not responding to motions, causing unnecessary delays in the timely processing of this lawsuit. If canceled the client, will not be obligated to pay any fee to the attorney for the work performed during this period. If the attorney has advanced funds to others in representation of the client, the attorney is entitled to reimbursement for such amounts as he or she has reasonably advanced on behalf of the client.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the date stated below. This agreement shall remain in effect until full settlement of the aforementioned case or until superceded by agreement of the parties.

Appendix D

//s//Sadie Moore Stewart

ATTORNEY SIGNATURE//DATE

FLORIDA BAR NR.

//s//Thelma Roby

PLAINTIFFS DESIGNATED REPRESENTATIVE/DATE

NOTARY
SIGNATURE/DATE

WITNESS //s//Tamara D. Tikell

SIGNATURE/DATE

APPENDIX E—REPORT OF THE REFEREE, THE FLORIDA BAR VS. SADIE MOORE STEWART FILED APRIL 27, 1998

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant, Case Nos. 91,263;91,338;91,S4O; and 92,515

vs. TFB File Nos. 97-00765-OlB; 97-00617-OlB; 97-00727-O1B,97-00190-01B; 97-00505-01B,97-O1312-OlB; and 98-00713-01B

SADIE MOORE STEWART,
Respondent.
_____/

REPORT OF THE REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On August 25, 1997, The Florida Bar filed its Complaint in Supreme Court Case No. 91,263 (The Florida Bar File No. 97-00765-OlB) against Respondent as well as

its Request for Admissions in these proceedings. On September 3, 1997, The Florida Bar filed its Complaint in Supreme Court Case No. 91,338 (The Florida Bar File No.97-00797-0 I B) against Respondent as well as its Request for Admissions in these proceedings. On November 19, 1997, The Florida Bar filed its Complaint in Supreme Court Case No. 91,840 (The Florida Bar File No. 97-00617-OlB, against Respondent as well as its Request for Admissions in these proceedings. By order dated February 13, 1998, this Referee consolidated Supreme Court Case Nos. .91,263;91,338; and 91,8 4O. On March 6,1998, The Florida Bar filed its Complaint in Supreme Court Case Into. 92,515 (The Florida Bar File Nos. 97-0019001B and 97-00505-01B) against Respondent as well as its Request for Admissions in these proceedings. On April 15, 1998, in The Florida Bar File No. 97-0132-O1B, Respondent waived the finding of probable cause and waived the filing of a formal complaint and consented to this Referee having jurisdiction to hear this matter. Also on April 15, 1998, in The Florida Bar File No. 98-0071--01B, Respondent waived the finding of probable cause and waived the filing of a formal complaint and consented to this Referee having jurisdiction to hear this matter. By motion of the parties, which was ordered by this Referee, all of the aforementioned cases have been consolidated and are considered herein. The patties entered into a conditional guilty plea for consent judgment and joint recommendation as to discipline which have been submitted to this Referee and are hereby approved. All of the aforementioned pleadings and responses thereto and this Report constitute the record in this case and are forwarded to the Supreme Court of Florida.

Appendix E

I. FINDINGS OF FACT AND RECOMMENDATIONS

A. Jurisdictional Statement.

Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida. The Referee was appointed by the Supreme Court of Florida to hear the matters involved in Supreme Court Case Nos. 91,963, 91,3~8, 91,840 and 99,515. Respondent consented to Referee having jurisdiction over The Florida Bar File Nos. 97-01,1~0 LB and 9S-007 1~01B and to consolidation of these cases with Supreme Court Case Nos. 91,960, 91,3,8, 91,S40 and 99,515.

B. Narrative Summaries of Facts.

Case No. 91,263 (TFB File No. 97 00765-0IB)
Complaint of The Florida Bar

Respondent was required to complete 30 hours, including two hours of Ethics, of Continuing Legal Education prior to July 31, 1996. On or about August 16, 1996, The Florida Bar, via certified mail, advised Respondent that she was ineligible to practice law because of her failure to comply with her Continuing Legal Education Requirements (CLER). Due to Respondent's direction to her of Lice staff, Respondent did not pick up the certified letter from The Florida Bar until September 19, 1996.

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On or about September 26,1996, Respondent filed a motion for extension of time in Michael Clark v. Robert E. Rubin, Secretary of the Treasury, the Department of Treasury, and the U S. Customs Service, Case No. 5:96CV3361RH, in the United States District Court, Northern District of Florida, Panama City Division, citing therein her health as the reason for the motion. At no time did Respondent advise the United States District Court that she was ineligible to practice law due to her failure to comply with CLER.

On or about October 1, 1996, Respondent petitioned The Florida Bar for removal of CLER delinquency. In so petitioning, Respondent divas required to fill out a form petition for removal of CLER delinquency. Respondent answered under oath all questions on the form petition except the following:

> "5. During my delinquency, I have/have not (circle one) practiced law in Florida or rendered advice on matters of Florida law."

Respondent was reinstated to membership in good standing on or about October 3, 1996. Respondent continued her practice of law during the period that she was ineligible to practice law in Florida and despite her knowledge that she was ineligible to do so.

Based upon Respondent's admission, I recommend that Respondent be found guilty of violating Rule 1-3.4(a) (Any member who is suspended by reason of failure to complete continuing legal education requirements shall be deemed a delinquent member. A delinquent member shall

not engage in the practice of law in this state and shall not be entitled to any privileges and benefits accorded to members of The Florida Bar in good standing. Any member suspended for failure to complete continuing legal education requirements may be reinstated as elsewhere provided in these rules) of the Rules of Professional Conduct.

Case No. 91,338 (TFB File No. 97-00797-01B
(Complaint of James Hawthorne)

James E. Hawthorne filed suit in the United States District Court, Northern District of Florida, Pensacola Division, alleging racial discrimination and retaliatory conduct by the University of West Florida. After the University of West Florida filed a motion to dismiss, Mr. Hawthorne hired Respondent to represent him in this lawsuit.

On or about August 93, 1995, Respondent filed a notice of appearance in the case. Pursuant to an agreement of counsel and a pre-trial order, certain disclosures as required by Rule 26 (N) of the Federal Rules of Civil Procedure (regarding witness lists, inter alia) were due to be filed on December 90, 1995. On or about December '9 1995, the University of West Florida filed its Rule 96 (A) disclosure. On or about February 0,, 1996, the University of West Florida filed a motion to compel the filing of the Plaintiffs Rule 26 (at) disclosure. By order dated March 7, 1996, the court granted the University of West Florida's motion to compel arid ordered that Plaintiffs Rule 96 (A) disclosure should be filed by March 14, 1996. The court also awarded attorneys fees in the amount of 563 to the

University of West Florida which fees were to be paid within 10 days of the court's order.

Respondent filed the Plaintiffs Rule 96 (ok) disclosure on March 1A, 1996. The University of West Florida filed a motion for summary judgment in April 1996, to which Respondent responded. By order dated October 9~, 1996, the court granted summary judgment unto the University of West Florida. Respondent forwarded a copy of the order granting summary judgment to Mr. Hawthorne. Respondent did not clearly advise Mr. Hawthorne that he had 30 days from October 99, 1996 within which to file a notice of appeal of the order granting summary judgment. On Wednesday, November 90, 1996, Mr. Hawthorne contacted Respondent to inquire as to whether she aids going to file an appeal of the order granting summary judgment. Respondent appeared to De unaware that the time for filing the appeal ran on November 91, 1996. Apparently Air. Hawthorne was under the impression that the time to appeal ran on November 79, 1996; nonetheless, on November ~ 1, 1996, he filed a notice of appeal *Pro Se*. Respondent did not clearly establish with her client the issue of whether Mr. Hawthorne wanted to appeal the summary judgment and whether Respondent would file that notice of appeal for Mr. Hawthorne.

Respondent agreed to accept the representation of Mr. Hawthorne for a $ 500 retainer plus a fee contingent upon the outcome of the case. Respondent did not enter into a written contingency fee contract with Mr. Hawthorne nor did she provide Mr. Hawthorne with a copy of the statement of clients rights.

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Based upon Respondent's admission, I recommend that Respondent be found guilty of violating Rules 4-1.3 (A lawyer shall act with reasonable diligence and promptness in representing a client), 4-14(b) (Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), 4-3.2 (A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.), and 4-1.5(f) (Contingent Fees. As to contingent fees: (1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (f)(3) or by law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination; (2) Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in any action, claim, or proceeding whereby the lawyer's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in

the fee without the consent of the client in writing Each participating lawyer or law firm shall sign the contract with the client and shall agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved. The client shall be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of this rule shall apply to such fee contracts; (a) A lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims, whereby the compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only under the following requirements: (A) The contract shall contain the following provisions: (i) "The undersigned client has, before signing this contract, received and read the statement of client's rights and understands each of the rights set forth therein. The undersigned client has signed the statement and received a signed copy to refer to while being represented by the undersigned attorney(s)." *(ii)* "This contract may be cancelled by written notification to the attorney at any time within 3 business days of the date the contract was signed, as shown below, and if cancelled the client shall not be obligated to pay any fees to the attorney for the work performed during that time. If the attorney has advanced funds to others in representation of the client, the attorney is entitled to be reimbursed for such amounts as the attorney has reasonably advanced on behalf of the client; (C) Before a lawyer enters into a contingent fee contract for representation of a client in a matter set forth in this rule, the lawyer shall provide the client with a

copy of the statement of client's rights and shall afford the client a full and complete opportunity to understand each of the rights as set forth therein. A copy of the statement, signed by both the client and the lawyer, shall be given to the client to retain and the lawyer shall keep a copy in the client's file. The statement shall be retained by the lawyer with the written fee contract and closing statement under the same conditions and requirements as subdivision (f)(S).) of the Rules of Professional Conduct.

Case No. 91,840. TFB File No. 97-00617-OlB
(Complaint of Gillis Thomas))

In approximately November 1996, Respondent was hired to represent Gillis Thomas in an employment discrimination matter against J.C. Penney, Inc. A hearing was scheduled before the Honorable Lacy Collier, U.S. District Court, Northern District of Florida, Pensacola Division, for June 14, 1996 at 10:00 a.m. Respondent failed to appear at the hearing before Judge Collier. Respondent did attempt to make a telephone appearance before Judge Collier in this matter, but such appearance was denied. As a result of the June 11, 1996 hearing, certain costs were assessed against Mr. Thomas, the Plaintiff.

After Mr. Thomas filed a complaint with The Florida Bar on January 17, 1997, Respondent wrote Mr. Thomas and advised that she was terminating the representation and cited therein certain attorney/client privileged, and therefore confidential, information relative to Mr. Thomas' case against J.C. Penney. Respondent provided J.C. Penney's counsel with a copy of her attorney/client privileged communication with Mr. Thomas which disclosed

information detrimental to Mr. Thomas' action against J.C. Penney.

Based upon Respondent's admission, I recommend that Respondent be found guilty of violating Rules 4-1.6(a! (Confidentiality of information (a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client and 4-3,4(c) (A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists) of the Rules of Professional Conduct.

Case No. 92.515(TFB File Nos. 97-00190-01B and 97-00505-01B)
(Complaints of Sammy Barnes, Ray Dunklin, and James Cox and Gary Scott)

Respondent was hired, as successor counsel, by nine people to represent them in a racial discrimination case arising out of their employment by the U.S. Navy, Coastal Systems Station, Panama City, Florida. The representation was intended to become a class action matter.

On or about November 27, 1995, Respondent entered into a modified contingency fee agreement, signed by three of the Plaintiffs, Sammy Barnes, Ray Dunklin, and James Cox, in which the Respondent was paid a $12,500.00 retainer. Costs of the litigation were to be paid by the clients.

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At the time the clients hired Respondent, they inquired about Respondent's experience in handling United States Code Title VII discrimination cases and class action matters. Respondent advised her clients that she was experienced and could handle their legal matter. At no time did the Respondent advise the clients that her experience in United States Code Title VII actions had been limited to administrative actions before the Equal Employment Opportunity Commission (EEOC). At no time prior to being hired did Respondent advise her clients that she had never before participated in a class action matter.

Beginning in the spring of 1996 and for approximately three months, Respondent was out of her office a significant amount of time because of a family member's illness. Respondent left her paralegal, Tamara Tikell, in charge of her law practice. Ms. Tikell, as Respondent's agent, requested $1,000 from the clients in April 1996 to be used to pay costs of the litigation. The clients delivered a $1,000 check to Respondent's office in April 1996. The clients repeatedly requested a receipt for the $1,000 from Respondent's office, to no avail. The clients requested an accounting for the $1,000 which Respondent did not provide.

In response to the instant inquiry/complaint (TFB File No. 97-00505-01B) on January 3, 1997, Respondent advised The Florida Bar that "[t]he money in question was used to pay for transcripts of the Plaintiff's depositions and miscellaneous expenses." Respondent's response references a court reporter bill for $945.25. Because of the allegations regarding the $1,000 court deposit, the First Judicial Circuit Grievance Committee "B" requested an

audit of Respondent's trust account for the time period January 1, 1995 through May 31, 1997. The audit reveals, and Respondent confirms, that the $1,000 check for costs was not deposited into Respondent's trust account. The $1,000 was not applied towards the clients' cost of litigation. The $1,000 was deposited into Respondent's operating account. According to Respondent, Tamara Tikell removed the $1,000 from Respondent's operating account immediately after it was deposited therein.

Respondent became aware of the discrepancy over the $1,000 costs in approximately May 1996. Respondent states that sometime after October, 1996, using her own funds, she paid a court reporter $945.25 to cover the costs of depositions related to this matter. Respondent has not accounted to the clients for the balance of $54.75.

The trust account audit, unable to be completed due to lack of records, revealed the following deficiencies:

A. Respondent did not maintain the following records:

-Original or duplicate deposit records, indicating (a) date and source of the deposit and (b) client and/or matter, for the months of July 1995 through August 1996;

-Original cancelled checks for July 1995 through August 1996;

-Case receipts and disbursements journal;

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-Client ledger accounts;

-Bank reconciliations;

-Monthly comparisons;

-Annual listing of trust obligations;

B. Respondent's trust account is not set up as an IOTA (Interest on Trust Accounts) account;

C. The checks do not reflect Ms. Stewart's name, nor do the checks reflect that the account is a trust account.

D. A shortage of funds existed in the trust account.

Based upon Respondent's admission, I recommend that Respondent be found guilty of violating Rules 4-1.4(b) (Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonable necessary to permit the client to make informed decisions regarding the representation), 4-1.15(a) (Clients' and Third Party Funds to be Held in Trust. A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with representation. All funds, including advances for costs and expenses, shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person, provided that funds may be separately held and maintained other than in a bank account if the lawyer received written permission from the client to do so and provided that such written permission is received prior to maintaining the funds

other than in a separate bank account. In no event may the lawyer commingle the client's funds with those of the lawyer or those of the lawyer's law firm. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property, including client funds not maintained in a separate bank account, shall be kept by the lawyer and shall be preserved for a period of 6 years after termination of the representation), 4-1.15(b) (Notice of Receipt of Trust Funds; Delivery; Accounting. Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client of third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property) of the Rules of Professional Conduct, and 5-1.1(a) (Nature of Money or Property Entrusted to Attorney. Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of an attorney are not subject to counterclaim or setoff for attorney's fees, and a refusal to account for and deliver over such property upon demand shall be deemed a conversion. This is not to preclude the retention of money or other property upon which the lawyer has a valid lien for services or to preclude the payment of agreed fees from the proceeds of transactions or collection. Controversies as to the amount of fees are not grounds for disciplinary proceeding unless the amount demanded in clearly excessive,

extortionate, or fraudulent. In a controversy alleging a clearly excessive, extortionate, or fraudulent fee, announced willingness of an attorney to submit a dispute as to the amount of a fee to a competent tribunal for determination may be considered in any determination as to intent or in mitigation of discipline; provided, such willingness shall not preclude admission of any other relevant admissible evidence relating to such controversy, including evidence as to the withholding of funds or property of the client, or to other injury to the client occasioned by such controversy),5-1.1(b) (Trust Accounts Required. Any bank or savings and loan association account maintained by a member of The Florida Bar to comply with rule 4-1.15, Rules of Professional Conduct, is and shall be clearly labeled and designated as a trust account. Any safe deposit box used in connection with the practice of law in Florida maintained by a member of The Florida Bar to comply with rule 4-1.15 shall be located in this state unless the client otherwise consents in writing. A member of The Florida Bar shall advise any institution in which such deposit box is located that it may include property of clients), 5-1.1(c) (Trust Accounts as Official Records. A member of The Florida Bar shall preserve or cause to be preserved the records of all bank and savings and loan association accounts or other records pertaining to the funds or property of a client or a third party maintained in compliance with rule 4-1.15 for a period of not less than 6 years subsequent to the final conclusion of the representation of a client relative to such funds or property. Such records shall include checkbooks, cancelled checks, check stubs, vouchers, ledgers and journals, closing statements, accounting or other statements of disbursements rendered to clients or third parties with regard to trust funds, or similar equivalent records clearly

and expressly reflecting the date, amount, source, and reason for all receipts, withdrawals, deliveries, and disbursements of the funds or property of a client or third party. Such records shall be kept pursuant to these rules as a specific prerequisite to the right to receive, deliver, and disburse funds or property of a client or third party and to have a public aspect relating to the protection of clients and to fitness of a member of The Florida Bar to practice law. In any instance of an alleged violation by a member of The Florida Bar of this rule or of any of the rules of Professional Conduct, such records insofar as they may relate in any way to the transaction, occurrence, or client in questions shall be produced by the member of The Florida Bar for inspection, audit, and copying by a designated representative of The Florida Bar upon the direction of this court, a grievance committee, the board of governors if acting pursuant to rule 3-7.5(b), or a referee. Such records or copies thereof shall be admissible in evidence in any proceeding under this rule, provided notice of such intended use shall be given to any client involved, if practicable, unless such client is already aware of such intended use, and upon good cause shown by such client the admission of the same shall be under such conditions as shall be reasonably calculated thereafter to protect the confidences of such client in the event the proceedings otherwise become public records. Permissible means of protection shall not prejudice the respondent and may include but are not limited to excision, in camera production, retention in sealed envelopes, or similar devices. Failure to maintain such records or to produce them upon such direction shall constitute ground for disciplinary action under this rule without regard to any other matter. The cost of any audit or investigation necessitated by such failure may be taxed against a

respondent), 5-1.1(d) (Trust Accounting. Minimum trust accounting records shall be maintained and minimum trust accounting procedures must be followed by all attorneys practicing in Florida who receive or disburse trust money or property), 5-1.1(e)(2) (Interest on Trust Accounts(IOTA) Program. Required participation. All nominal or short-term funds belonging to clients or third persons that are placed in trust with any member of The Florida Bar practicing from an office or other business location within the State of Florida shall be deposited into one or more interest-banking trust checking accounts in an eligible financial institution for the benefit of the Foundation, except as provided in rule 4-1.15 with respect to funds maintained other than in a bank account, or as provided in rule 5-1.2(a). Only trust funds that are nominal or short term shall be deposited into an IOTA account. The member shall certify annually, in writing, that the member is in compliance with, or is exempt from, the provisions of this rule), 5-1.2(b) (Minimum Trust Accounting Records. The following are the minimum trust accounting records that shall be maintained: (1) A separate bank account or accounts and, if utilized, a separate savings and loan association account or accounts. Such accounts shall be located in the State of Florida unless the client otherwise directs, in writing, or unless the financial institution in which the funds are maintained voluntarily submits to the jurisdiction of the Supreme Court of Florida. Such voluntary submission to the jurisdiction of the Supreme Court of Florida shall be on the form prescribed by the board of governors of The Florida Bar. The account or accounts shall be in the name of the lawyer or law firm and clearly labeled and designed as a "trust account." (2) Original or duplicate deposit slips and, in the case of currency or coin, an additional case receipts book, clearly

identifying: (A) the date and source of all trust funds received, and (B) the client or matter for which the funds were received. (3) Original canceled checks, all of which must be numbered consecutively, or, if the financial institution wherein the trust account is maintained doc not return the original checks, copies thereof, as provided by the financial institution. (4) Other documentary support for all disbursements and transfers from the trust account. (5) A separate cash receipts and disbursements journal, including columns for receipts, disbursements, transfers, and the account balance, and contained at least: (A) the identification of the client or matter for which the funds were received, disbursed, or transferred; (B) the date on which all trust funds were received, disbursed, or transferred; (C) the check number for all disbursements, and (D) the reason for which all trust funds were received, disbursed, or transferred. (6) A separate file or ledger with an individual card or page for each client or matter, showing all individual receipts, disbursements, or transfers and any unexpended balance, and containing: (A) the identification of the client or matter for which trust funds were received, disbursed, or transferred; (B) the date on which all trust funds were received, disbursed, or transferred; (C) the check number for all disbursements; and (D) the reason for which all trust funds were received, disbursed, or transferred. (7) All bank or savings and loan association statements for all trust accounts), and 5-1.2(c) (Minimum Trust Accounting Procedures. The minimum trust accounting procedures that shall be followed by all attorneys practicing in Florida who receive or disburse trust money or property are as follows: (1) The lawyer shall cause to be made monthly: (A) reconciliations of all trust

bank or savings and loan association accounts, disclosing the balance per bank, deposits in transit, outstanding checks identified by date and check number, and nay other items necessary to reconcile the balance per bank with the balance per the checkbook and the cash receipts and disbursements journal; and (B) a comparison between the total of the reconciled balances of all trust accounts and the total of the trust ledger cards or pages, together with specific descriptions of any differences between the 2 totals and reasons thereof. (2) At least annually, the lawyer shall prepare a detailed listing identifying the balance of the unexpended trust money held for each client or matter. (3) The above reconciliations, comparisons, and listing shall be retained for at least 6 years. (4) The lawyer or law firm shall authorize and request any bank or savings and loan association where the lawyer is a signatory on a trust account to notice Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, in the event any trust check is returned due to insufficient funds or uncollected funds, absent bank error. (5) The lawyer shall file with The Florida Bar between June 1 and August 15 of each year a trust accounting certificate showing compliance with these rules on a form approved by the board of governors of the Rules Regulating Trust Accounts of the Florida Bar.

TFB No. 97-01312-01B
(Complaint of Shirley Minter-Smith)

Respondent waiver a formal finding of probable cause and the filing of a formal complaint with respect to TFB File No. 97-01312-01B.

Appendix E

On August 22, 1996, Respondent was retained by Ms. Shirley Minter-Smith to serve as attorney ad litem for her minor son's emancipation proceeding.

On or about September 11, 1996, Ms. Minter-Smith's son was arrested for aggravated battery and robbery and Respondent was retained to handle his criminal case. Over the next 4-6 weeks, Ms. Minter-Smith was unable to communicate with Respondent to obtain information about the status of her son's criminal case.

On or about October 31, 1996, ms. Minter-Smith retained another attorney to handle her son's criminal matter.

Respondent did not proceed with the emancipation proceeding while the criminal charges were pending. It appears that Ms. Minter-Smith wanted to go forward with the emancipation proceeding notwithstanding the criminal proceedings, yet the communication between Respondent and Ms. Minter-Smith on this issue is not clear.

Based upon Respondent's admission, I recommend that Respondent be found guilty of violating Rule 4-1.4(a) (A lawyer shall keep a client reasonable informed about the status of a matter and promptly comply with reasonable requests for information) of the Rules of Professional Conduct.

Appendix E

TFB File No. 98-00713-01B\
(Complaint of The Florida Bar)

Respondent has waived a formal finding of probable cause and the filing of a formal complaint with respect to TFB File No. 98-00713-01B.

Respondent represented the Plaintiff Wanda Rogers in a federal action. The defendant, Marvin Runyon, the U.S. Postmaster, filed a motion for summary judgment. At the hearing on the motion for summary judgment, Respondent appeared by telephone without leave of court while the defendant's counsel was required to travel a significant distance to attend this hearing. Respondent conceded that summary judgment was appropriate. The defendant moved for a judgment of costs against Respondent based upon the above and Respondent did not respond, despite a requirement to do so under the court's rules. By order dated December 2, 1997, the United States District Court ordered Respondent to pay $2,260 to the defendant for her actions herein.

Respondent did not respond to The Florida Bar's requests for information about this matter violating Rules 4-3.4(c) (A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists) and 4-8.4(g) (A lawyer shall not fail to respond, in writing, to any inquiry by a disciplinary agency when such agency is conducting an investigation into the lawyer's conduct) of the Rules of Professional Conduct.

Appendix E

III. RECOMMENDATION AS TO DISCIPLINARY MEASURE TO BE APPLIED

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and in accordance with the terms of the consent judgment that she be disciplined by:

A. Suspension from the practice of law for ninety-one(91) days, which requires proof of rehabilitation.

B. Payment of The Florida Bar's costs in these proceedings.

IV. PERSONAL HISTORY PAST DISCIPLINARY RECORD AND AGGRAVATING AND MITIGATING FACTORS

Prior to recommending discipline pursuant to Rule 3-7.6(k)(l), I considered the following:

A. Personal History of Respondent:

Age: 47 years old

Date admitted to the Bar: January 29, 1993

Appendix E

B. Aggravating Factors:

i. 9.22(a) Prior Discipline: The Florida Bar File No. 96-00126-01B (Complaint of Eugene M. Bernstein) - Respondent's neglect and lack of communication in an EEOC matter resulted in an admonishment before the grievance committee in 1996.

Supreme Court Case No. 90,013; The Florida Bar File No. 96-00958-01B (Complaint of Jonathan McNabb) - Respondent's neglect and incompetent representation in a criminal matter resulted in a public reprimand in 1997.

Respondent is currently on an indefinite suspension for failure to comply with a trust account subpoena, as outlined in the consent judgment. Supreme Court Case No. 91,803, The Florida Bar File No. 98-00123-01B.

ii. 9.22(c) - Pattern of misconduct; and

iii. 9.22(d) - Multiple offenses.

C. Mitigating Factors:

i. 9.32(b) - Absence of dishonest or selfish motive;

ii. 9.32(c) - Personal or emotional problems - During 1996, Respondent was coping with the terminal illness and subsequent of one of her sisters, for

whom she was a caregiver. Further, Respondent was coping with the commission of a violent crime against her other sister.

These events took Respondent out of her law office for a period of time and diverted her attention away from her law practice.

iii. 9.32(f) - Inexperience in the practice of law - Respondent was admitted to the practice of law on January 29, 1993 and most of the events occurred between late 1995 and 1997;

iv. 9.32(e) - Full and free disclosure to disciplinary board or cooperative attitude towards proceedings Respondent has cooperated with The Florida Bar in these proceedings and has been candid with The Florida Bar regarding her role and responsibility for these matters. Such cooperation and candor is a major consideration by the Florida Bar in entering into this consent judgment. Respondent contends that where she was nonresponsive, she had nothing to add to the proceedings;

v. 9.32(h) - Physical or mental disability - Respondent suffers from Lupus which was diagnosed in 1997. During the time periods involved in these matters, Respondent was suffering from the symptoms of Lupus, which were undiagnosed. Respondent is currently being treated for Lupus.

vi. 9.32(1) - Remorse - Respondent's intent was to help these clients and she is remorseful that her actions or inactions resulted in harm to the clients and the public. Respondent recognizes that her major weakness stems from lack of office management skills and that she needs to associate herself with others who are better equipped at office management matters.

STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the following costs were reasonably incurred by The Florida Bar:

TFB File Nos. 97-00727-01B, 97-007654-01B, and 97-00617-01B

Administrative Costs pursuant Rule 3-7.6(o)(1), Rules of Discipline	$ 750.00
Court Reporter Fees and Transcripts	305.50
Bar Counsel Travel Expenses and Witness Travel Expenses	242.57 25.33
Subtotal	$1,323.40

TFB File Nos. 97-00190-01B and 97-00505-01B

Administrative Costs pursuant Rule 3-7.6(o)(1), Rules of Discipline	$ 750.00
Court Reporter Fees and Transcripts	426.00
Grievance Committee Investigative Expenses	175.96
Bar Counsel Travel Expenses and	133.25
Auditor Expenses (Travel and Audit)	446.58

Appendix E

Witness Travel Expenses	73.30
and Copies	24.00
Subtotal	$2,029.09

TFB File No. 97-01312-01B

Court Reporter Fees and Transcripts	$ 265.00
Bar Counsel Travel Expenses and	118.41
Witness Travel Expenses	387.25
Subtotal	$ 770.66

TFB File No. 98-00713-01B

No costs associated with file.

TOTAL $4,123.15

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 27 day of April, 1998.

"s/ _____".

William L. Wright, Circuit Judge Referee
Jackson County Courthouse
Post Office Box 852
Marianna, Florida 32447-0852
(850)482-9078

Appendix E

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed by regular U.S. Mail to SID J. WHITE, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, and that copies were mailed by regular U.S. Mail to JOHN ANTHONY BOGGS, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; LOIS B. LEPP, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and SADIE MOORE STEWART, Respondent, at her record Bar address of 986 Caledonia Road, Cleveland Heights, Ohio 44112, on this 27 day of April, 1998.

"s/ _____".
William L. Wright, Referee

APPENDIX F—PLAINTIFFS-APPELLANT'S FOIA/PRIVACY ACT REQUEST TO THE AGENCY DATED MAY 22, 1995

From: See Enclosure (1) Schedule of Depositions
To: Freedom of Information Act (FOIA) Officer, Human Resources Office, 368 South Ave., Pensacola, FL 32508-5214

Subj: FOIA/PRIVACY ACT REQUEST

1. This is a request under the FOIA, 5 U.S.C. Section 552 and the Privacy Act, 5 U.S.C. Section 552a. The United States Attorney for the Northern District of Florida has notified us that he will take depositions in the case of Abraham Johnson, et al v. John H. Dalton, civil Action Number 94-30165-RV. Enclosure (1) lists the time and date of these to be deposed. The US Attorney's Office has requested that all records and information related to this action be brought with us at the time we are to be deposed.

2. We understand that the standard time for answering FOIA requests is 10 days; however, the below requested information is needed so that we can fully comply with the US Attorney's proposed depositions of us. Thus, we request that you provide this information expeditiously to the addresses listed in item 4, and all documents, memoranda, notes, reports, diaries, things and computer disks in your possess or under your control related in any way to the parties to this civil action including, but not limited to, the following:

a. Any personnel files, wherever maintained;
b. Any departmental files, wherever maintained;
c. Any and all EEO complaints, wherever maintained;

d. Any and all MSPB complaints, wherever maintained;

e. Any and all union grievances, wherever maintained;

f. Any and all offers of employment; applications for employment; terms, conditions, and benefits of employment; employment contracts, if any, and/or amendments thereto; resumes or Forms SF-171; and insurance related documents.

g. Any and all job assignments, job requirements, job title or job status, benefits statements, rates of pay, and evaluations of job performance;

h. Any and all offers of employment; applications for employment; terms, conditions, and benefits of employment; employment contracts, if any, and/or amendments thereto; resumes or Forms SF-171; and insurance related documents;

i. Any and all documents wherever maintained, including but not limited to, notes, papers, transcripts, files, diaries, notebooks, computer disks, video tapes, recording an/or writings which relate to, pertain to, refer to, or support any or all of the allegations in the complaint in this matter.

3. We request a waiver of all fees for this request. We are the Plaintiffs in civil Action #94-30165-RV and we are seeking information to assist us in fully answering the United States Attorney when he deposes us about the above referenced civil action.

4. If you require any assistance in expediting this request or have any questions, the point of contact for this request is Darlene D. Sharpe, she can be reached at 452-3692. Thank you for your consideration of this request.

Appendix F

The requesters and addresses are as follows:

Thelma Roby
200 E. Burgess Rd.,
Apt. #48B
Pensacola, FL 32503

Jerald Lacey
4552 Independence Ave.
Pensacola, FL 32505

Eugene Lovelace
3410 W. Hernandez St
Pensacola, FL 32503

Darlene D. Sharpe
8800 Fowler Ave., Apt.
#B203
Pensacola, FL 32534

Frances Brown
P. O. Box 125
Pensacola, FL 32591
-0125

Arnetha Welcome
502 N. Green St.
Pensacola, FL 32505

James R. Welcome
502 N. Green St.
Pensacola, FL 32505

April Posey
6672 Bellview Pines Place
Pensacola, FL 32526

Fred Bass
75 South Madison
Pensacola, FL 32534

Vera Evans
940 N. "C" St
Pensacola, FL 32501

Robert Brooks
712 W. Gregory St.
Pensacola, FL 32501

Sylvia Bell
910 Winston Ave
Pensacola, FL 32507

Mary Gibson
309 Gamarra Rd
Pensacola, FL 32503

Willie Carson
To be provided

Appendix F

Tommie Ware
1301 E. Leonard St
Pensacola, FL 32501

Van G. Nelson
2490 Bellview Pines Way
Pensacola, FL 32526

Calvin Robinson
318 E. Garfield Dr.
Pensacola, FL 32505

Earnest Standberry (Retired)
8719 Orange Ave
Pensacola, FL 32534

Willie Remer Young
1006 Texar Dr
Pensacola, FL 32503-3643

Robert Taylor
6492 Memphis Ave.
Pensacola, FL 32506

Abraham Johnson
3300 Rollingbrook Rd.,
Apt. 1017
Daytown, TX 77521

Fred Hicks
744 Boxwood Dr
Pensacola, FL 32503

Marilyn Alexander
6444 Memphis Ave
Pensacola, FL 32506

J.W. Bridges
2208 Inverness Dr
Pensacola, FL 32503

Robert Broughton
8317 Ranger Dr
Pensacola, FL 32534

Pat Frelix
C/O Thelma Roby
200 E. Burgess Rd.,
Apt 48B
Pensacola, FL 32503

Gilda James
4001 Shorewood Dr
Pensacola, FL 32507

Eugene Ward
2301 St. Andrews Dr
Cantonment, FL 32533

Appendix F

Lorenzo Chatman
395 N. "T" St
Pensacola, FL 32505

Jennifer Jones-Butler
4519 Chantilly Way
Pensacola, FL 32505

Velma Jones
1956 Gary Circle
Pensacola, FL 32505

Debrah Burgess
630 W. Lee St
Pensacola, FL 32501

Lamar Jackson
P. O. Box 16051
Pensacola, FL 32507

Larry Goggans
2031 Brenda Ave
Pensacola, FL 32506

Roscoe Kidd
8295 Ranger Dr
Pensacola, FL 32534

James Stanten
6410 Birkhead Dr
Pensacola, FL 32506

Lillian Smith
1251 Mahogany Mills Apt
Pensacola, FL 32507

Robert Cannon
3161 Torres Ave
Pensacola, FL 32503

Victor Barnes
1999 Detroit Blvd
Pensacola, FL 32534

Margaret McQueen
P. O. Box 474
Cantonment, FL 32533

Leslie Johnson
903 W. Hatton St
Pensacola, FL 32501

Kathy Floyd
611 Washington St
Cantonment, FL 32533

Wilbur Henderson
C/O Thelma Roby
200 E. Burgess Rd, Apt 48B
Pensacola, FL 32503

Joseph Wright
125 W. Highland Dr
Pensacola, FL 32503

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James Thompson
5 N. 9th Ave
Pensacola, FL 32503

James Royster (Retired)
1105 W. Leonard St
Pensacola, FL 32501

Margaret Miles
4495 Landes Dr
Pensacola, FL 32505

APPENDIX G—FOIA OFFICER'S RESPONSE TO PLAINTIFFS-APPELLANT'S REQUEST SIGNED DATED JUNE 2, 1995

5720
Code 09A1
Jun 02 1995

Ms. Darlene D. Sharpe
8800 Fowler Avenue
Apartment B203
Pensacola, FL 32534

Dear Ms. Sharpe:

This is in response to the Freedom of Information/Privacy Act request which you hand delivered to the Human Resources Office Pensacola on May 22, 1995. You requested documents and files pertaining to 47 different individuals. You further indicated that the documents were required to respond to a Notice of Video Tape Deposition issued by the U. S. Attorney in the case of Abraham Johnson Jr., et al v. John H. Dalton. That Notice required the deponent to bring certain documents "in his or her possession or under his or her control." Since you have indicated the requested records are required to respond to the U.S. Attorney, be advised that the Human Resources Office has turned the files over to the cognizant Assistant United States Attorney. To facilitate your expeditious access to these records, you should contact your attorney so that he can arrange for the necessary discovery notices to be issued. Point of contact for the Navy in the U.S. Attorney's office is Mr. Anthony Crouse and he may be reached at 434-3251.

Sincerely.

"s/ ".

M. D. MILLAS
Deputy Director, Acting

APPENDIX H—THE SUPREME COURT OF FLORIDA DISCIPLINES SADIE MOORE STEWART RELEASED JULY 2, 1998

PUBLIC & MEDIA INFORMATION

Public and Media Information
Discipline Releases
Discipline Release: July 2, 1998

FOR IMMEDIATE RELEASE
July 2, 1998
CONTACT: Toyca D. Williams
The Florida Bar
TELEPHONE: 850/561-5666

FROM THE FLORIDA BAR

SUPREME COURT DISCIPLINES 34 ATTORNEYS

TALLAHASSEE, July 2 – The Florida Supreme Court in recent court orders suspended 18 attorneys, disbarred three, reprimanded five, accepted the resignation of seven attorneys and placed one on probation. The Supreme Court of Florida issued these orders following action by The Florida Bar.

The following lawyers are disciplined:

Raymond A. Argyros, 511 Paula Dr., South, **Dunedin,** automatically **suspended** from practicing law in

Florida,effective immediately following a May 1 court order. Argyros, found guilty of perjury, was sentenced to five years probation.

Andrew Baron, 1803 E. Kaley St., **Orlando**, **reprimanded** for professional misconduct following a May 14 court order. Baron ran an advertisement in the telephone book that failed to meet Bar standards. The Standing Committee on Advertising had advised Baron earlier that the same advertisement did not meet specific guidelines. He also failed to respond to Bar investigative inquiries. He is placed on probation for one year.

Discipline Release Page 7 of 9

Kenneth Robert Schroff, 346 Blake Ave., **Orange Park**, **resigned** in lieu of disciplinary proceedings, with leave to seek readmission after years, effective 30 days following a May 7 court order. In several instances, Schroff allegedly failed to competently represent his clients and allegedly failed to act with diligence and promptness. He agreed to cooperate with any Client Security Fund claims related to his clients.

Lloyd Raymond Schwed, 19055 S.E. Coral Reef Lane, **Jupiter**, **suspended** from practicing law in Florida for two years, retroactive to Sept. 12, 1996, following a March 19 court order. Schwed pleaded guilty to one count of obstructing proceedings before the Securities Exchange Commission. He was sentenced to five months in prison and five months home confinement. Within a couple days

after his arrest, Schwed filed a voluntary petition with The Florida Bar to suspend his license.

Sadie Moore Stewart, 986 Caledonia Ave., **Cleveland Heights, Ohio, suspended** from practicing law in Florida for 91 days, effective immediately following a May 14 court order. In several unrelated cases, Stewart violated rules regulating the Bar. She practiced law while suspended and failed to diligently represent her clients, explain matters fully to clients, meet contingency fee guidelines comply with many other Bar rules.

Ernest J. Szarwark, 503 Lynnwood Blvd., **Nashville, Tenn.**, automatically **suspended** from practicing law in Florida, effective immediately following a May 18 court order. Szarwark was found guilty of four courts of mail fraud, a felony. He was sentenced to 24 months in prison, with two years of supervised release.

Claire L. Tacher, 15041 S.W. 146th St., **Miami, resigned** in lieu of disciplinary proceedings, with leave to seek readmission after five years, effective immediately following a May 7 court order. Tacher allegedly violated Bar rules regulating trust accounts. She also failed to communicate with her client, represent her client diligently, file an appellate brief and respond to Bar

No.

In The

Supreme Court of the United States

October Term, 1998

THELMA ROBY
DARLENE SHARPE
JAMES WELCOME,

Petitioners,

vs.

JOHN H. DALTON,

Respondent.

PROOF OF SERVICE

We, Thelma L. Roby, Darlene D. Sharpe, and James R. Welcome, do swear or declare that on this date, enclosed PETITION FOR A WRIT OF CERTIORARI on each of the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them with first-class postage prepaid.

The names and addresses of those served are as follows:

The U.S. Attorney, P. Michael Patterson
114 E. Gregory Street
Pensacola, FL 32501-4972

We declare under penalty of perjury tht the foregoing is true and correct.

Executed on 3 March, 1999.

Thelma L. Roby Darlene D. Sharpe James R. Welcome

Signature Signature Signature